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ABSTRACT

The paper examines issues involved in disciplinary exclusion of seriously emotionally disturbed students. Distinctions are made between suspension and expulsion, and applicable federal legislation (including P.L. 94-142, the Education for All Handicapped Children Act and Section 504 of the Rehabilitation Act of 1973) is reviewed in terms of implications for free appropriate public education, least restrictive environment, due process, change of placement, and placement during proceedings. Four main issues surrounding disciplinary exclusion are considered: the relationship of the child's behavior to his/her identification as handicapped; limits to a school's responsibility to provide a free public education to handicapped students; decision making in disciplinary matters involving handicapped students; and procedural safeguards to be used if exclusion is elected. Court cases are cited which suggest that emergency exclusion of handicapped children is permitted so long as due process is followed, but that nonemergency (or permanent) exclusion may violate the mandates for free appropriate public education. Issues not yet addressed include whether individualized education programs should regularly include disciplinary consequences and possible effects of changes in the laws or regulations. Extensive appendixes include annotated court cases and relevant sections of federal legislation. (CL)

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WORKING PAPER: DISCIPLINARY EXCLUSION

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DISCIPLINARY EXCLUSION OF SERIOUSLY EMOTIONALLY DISTURBED CHILDREN FROM PUBLIC SCHOOLS

Introduction

Background

Since the passage of federal legislation relating to the education of handicapped children, it has been necessary to scrutinize a variety of common educational practices in order to insure that they are compatible with the requirements of the legislation. One such practice is the disciplinary exclusion of students from educational programs. Although disciplinary exclusion of students is not addressed per se in federal mandates, it is particularly important because it does confront two of the key guarantees contained in the legislation: that of a free appropriate education in the least restrictive environment for handicapped children. Thus, it represents an area of potentially conflicting policies and actions which has not yet been clearly addressed by the Office of Special Education (OSE) in its policy decisions and interpretations.

Disciplinary exclusion of students has long been a practice and concern of public schools, and it is likely to continue to surface frequently in public school environments. Discipline and behavior management in general are consistently identified as high priority concerns of both educators and the public that supports education (Gallup, 1981; Grosenick and Huntze, 1980). Certainly, disciplinary exclusion of students appears to be a standard practice of nearly all school systems, although individual procedures vary considerably from district to district. The concern for maintaining discipline in school environments is particularly problematic

where youngsters are involved who are or could potentially be identified as being seriously emotionally disturbed. Traditionally, many of these students have been excluded from school programs, a fact which was one of the provocations for federal legislation in the first place (Regal, Elliot, Grossman and Morse, 1972). While federal policy makers have been reluctant to interfere with the schools' flexibility to deal with 'iscipline issues (and ironically, to some extent, because they have been reluctant), the courts and the Office of Civil Rights (OCR) are becoming more involved in the issue. As a result, it would appear that there is a tremendous need for clarification of the policy issues surrounding the disciplinary exclusion of handicapped (particularly seriously emotionally disturbed) students.

Purpose

The purpose of this paper is to explore and clarify issues surrounding the practice of disciplinary exclusion of seriously emotionally disturbed students. There is no doubt that the issues surrounding this practice are of prime importance to policy makers at the local level, state level persons who supervise local compliance with Federal law and college and university faculty who must train teachers concerning their responsibilities to emotionally disturbed students. Thus, it is timely that professionals in the field turn their attention to the examination of the practice in a systematic fashion. Any clarification of these issues, should be comprised of several steps including: 1) delineation of the relevant legislation; 2) a synopsis of the most critical issues; 3) a review of court cases, OCR, OSE and State Education Agency (SEA) findings that speak to those critical issues; and 4) a suggestion of policies and/or guidelines for local policies and decision

making based on current judicial and administrative thinking. The purpose of this paper is to address the first three steps. However, relative to step three, only court and OCR decisions will be explored. This delimitation occurs for two reasons. First, both the courts and OCR have investigated and made decisions concerning this topic to a greater extent than have SEAs or OSE. Secondly, given the lack of OSE direction and the conflicting nature of the SEA decisions that do exist more consistent opinions that are likely to set precedent for all states can be found in court and OCR decisions. The above three steps constitute a brief "state of the art" on the topic and, hopefully, establish a base from which others may pursue the critical step 4.

Definitions

Exclusion refers to the removal from or the prohibition of participating in the public school program in part or entirety. A substantial body of policy and litigation exists which relates to exclusion based on such issues as health and immunization of students, educability and academic admission criteria for students and existence of handicapping conditions. While some of the judicial and administrative decisions relative to these different causes for exclusion may be predicated upon principles similar to those used for decisions on disciplinary exclusion, this paper focuses only on disciplinary exclusion, i.e., exclusion resulting from the student's behavior and designed to protect the "decorum" and "educational environment" appropriate to a public school. As will be seen later, particular attention should be paid to the environment from which a student is excluded, i.e., exclusion from what placement.

There are two broad types of disciplinary exclusion: suspension and expulsion. As developed through recent practice, suspension usually refers to a temporary (10 days or less) exclusion of a student, typically as a result of a crisis or emergency situation. Expulsion, on the other hand, usually refers to the more or less permanent exclusion of a student from a particular program or placement typically as a result (consequence or punishment) of behavior which was viewed as being severely disruptive of the school program or posing a threat to the physical or emotional well being of faculty and other students.

Three factors differentiate these two types of exclusion. As noted above, time is one differentiating factor. Suspension is a temporary measure, usually of a 3-10 day duration. Expulsion is for a longer period of time, i.e., for the remainder of a school year (although sometimes all future involvement is prohibited). A second differentiating factor involves the nature of the exclusion, i.e., emergency vs. non-emergency. This distinction is dealt with in greater detail in a later section of the paper. The third differentiating factor focuses upon due process requirements. The due process procedures associated with expulsion are more stringent than those required for suspension. Due process prior to expulsion has a long and clear case law history. It is accurate to say that no student (handicapped or not) may be permanently excluded (expelled) from educational participation without an opportunity for a formal evidentiary hearing. Suspension as opposed to expulsion, requires minimal due process, which most typically involves: oral or written notice of the charges against the student; an explanation of the evidence the school authorities have; and an opportunity for the student to present his/her side of the story (Goss v.

Lopez, 419 U.S. 565, 1975). Such minimal due process procedures most typically do not include a formal evidentiary hearing.

Applicable Federal Legislation

In order to pinpoint specific issues related to the disciplinary exclusion of seriously emotionally disturbed students, it is first necessary to identify the relevant legislation and regulations which impinge on this issue. Two overlapping pieces of federal legislation and their accompanying regulations are pertinent: Education of the Handicapped Act as amended by Public Law 94-142 (referred to hereafter as P.L. 94-142 or EHA), Section 504 of Public Law 93-112, the Rehabilitation Act of 1973 (referred to hereafter as Section 504). It is instructive to examine these laws and regulations in more detail in order to become familiar with those sections and discussions upon which the courts and OCR base their decisions and findings.

Public Law 94-142 and Implementing Regulations

The right to a free appropriate public education (FAPE) in the least restrictive environment (LRE) is specifically guaranteed to all handicapped children by P.L. 94-142. Because disciplinary exclusion can violate these guarantees, they are often the legal basis of court cases relative to disciplinary exclusion. Because these rights, as well as 14th amendment rights, can be violated, and because exclusion constitutes a change of placement (this will be discussed at a later time), any movement toward such exclu-

sion requires adequate procedural safeguards (due process). The law speaks very clearly concerning the appropriate due process that is to be accorded to handicapped individuals. Further, any student who has been referred for evaluation and/or has an appeal pending is accorded these procedural safeguards until a determination is made regarding the evaluation or appeal. Thus, Public Law 94-142 provides five relevant statutes to examine in relation to disciplinary exclusion:

Free Appropriate Public Education

1401(18). [Free appropriate public education]

The term "free appropriate public education" means special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title.

Least Restrictive Environment

1412(5)(B). [Least restrictive environment]

(B) procedures to assure that, to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and that special classes, separate schooling, or other removal of handicapped children from the regular educational environments occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily, and

Due Process

1415. Procedural safeguards
1415(a). [Establishment and maintenance]

(a) Any State educational agency, any local educational agency, and any intermediate educational unit which receives

assistance under this subchapter shall establish and maintain procedures in accordance with subsection (b) through subsection (e) of this section to assure that handicapped children and their parents or guardians are guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies and units.

Change of Placement

1415(b)(1)(C). [Prior written notice]

(C) written prior notice to the parents or guardian of the child whenever such agency or unit -

(i) proposes to initiate or change, or

(ii) refuses to initiate or change,

the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child;

Child placement during proceedings

1415(e)(3) [Child placement during proceedings]

(3) During the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents or guardian, be placed in the public school program until all such proceedings have been completed.

Each of these statutes is further elaborated upon in the appropriate sections of regulation related to each (See Appendix for Regulations keyed to each statute).

Section 504

The potential denial of rights associated with disciplinary exclusion is couched in the broad language of Section 504.

Law: 794. Nondiscrimination under Federal grants and programs.

No otherwise qualified handicapped individual in the United States,

as defined in section 706(6) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments of this section made by the Rehabilitation, Comprehensive Services, and Development Disabilities Act of 1978. Copies of proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

While Section 504 is itself much less detailed than EHA, it provides, through its implementing regulations, the same essential guarantees found in P.L. 94-142.

Regulations: FAPE, Educational Setting (LRE), Procedural Safeguards

Reg. 104.33 Free appropriate public education.

(a) General. A recipient that operates a public elementary or secondary education program shall provide a free appropriate public education to each qualified handicapped person who is in the recipient's jurisdiction, regardless of the nature or severity of the person's handicap.

(b) Appropriate education. (1) For the purpose of this subpart, the provision of an appropriate education is the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met and (ii) are based upon adherence to procedures that satisfy the requirements of Regs. 104.34, 104.35 and 104.36 ...

(c) Free education - (1) General. For the purpose of this section, the provision of a free education is the provision of educational and related services without cost to the handicapped person or to his or her parents or guardian, except for those fees that are imposed on nonhandicapped persons or their parents or guardian. It may consist either of the provision of free services or, if a recipient places a handicapped person in or refers such person to a program not operated by the recipient as its means of carrying out the requirements of this subpart, of payment for the costs of the program. Funds available from any public or private

agency may be used to meet the requirements of this subpart. Nothing in this section shall be construed to relieve an insurer or similar third party from an otherwise valid obligation to provide or pay for services provided to a handicapped person ...

Reg. 104.34 Educational setting.

(a) Academic setting. A recipient to which this subpart applies shall provide for the education of, each qualified handicapped person in its jurisdiction with persons who are not handicapped to the maximum extent appropriate to the needs of the handicapped person. A recipient shall place a handicapped person in the regular educational environment operated by the recipient unless it is demonstrated by the recipient that the education of the person in the regular environment with the use of supplementary aids and services cannot be achieved satisfactorily. Whenever a recipient places a person in a setting other than the regular educational environment pursuant to this paragraph, it shall take into account the proximity of the alternate setting to the person's home.

(b) Nonacademic setting. In providing or arranging for the provision of nonacademic and extracurricular services and activities, including meals, recess periods, and the services and activities set forth in Reg. 104.37(a)(2), a recipient shall ensure that handicapped persons participate with nonhandicapped persons in such activities and services to the maximum extent appropriate to the needs of the handicapped person in question.

(c) Comparable facilities. If a recipient, in compliance with paragraph (a) of this section, operates a facility that is identifiable as being for handicapped persons, the recipient shall ensure that the facility and the services and activities provided therein are comparable to the other facilities, services and activities of the recipient.

Reg. 104.36 Procedural safeguards.

A recipient that operates a public elementary or secondary education program shall establish and implement, with respect to actions regarding the identification, evaluation, or educational placement of persons who, because of handicap, need or are believed to need special instruction ore related related services, a system of procedural safeguards that includes notice, an opportunity for the parents or guardian of the person to examine relevant records, an impartial hearing with opportunity for participation by the person's parents or

guardian and representation by counsel, and a review procedure. Compliance with the procedural safeguards of section 615 of the Education of the Handicapped Act is one means of meeting this requirement.

Beyond the portions of P.L. 94-142 and Section 504 mentioned, there are no other federal statutes which relate to the topic of this paper with the possible exception and of the FAPE requirements of Public Law 89-313 (State Operated Programs for Handicapped Children). However, since it has seldom served as the legal basis for court decisions it has not been included in the present paper. No federal statute specifically mentions disciplinary exclusion, or addresses this practice directly. Specific references to disciplinary exclusion do occur in many other state and local statutes and regulations. It is, of course, impossible to summarize these disparate statutes and regulations here. State and local policies also restate, in various ways, the federal policies related to FAPE, LRE and Procedural Safeguards discussed earlier, and in some cases, they provide even more detail on how these policies will be applied within a particular jurisdiction. If conflict arises between state or local policy and the federal law, federal law is supreme (Grosenick, Huntze, Kochan, Peterson, Robertshaw & Wood, 1981).

Any overall consistency in state and local school disciplinary policy may be the result of several court actions on constitutional issues of "equal protection" (e.g., Brown v. Board of Education, 347 U.S. 483, 1954), "freedom of expression" (e.g., Tinker v. Des Moines, 393 U.S. 503, 1969) and "due process" (e.g., Goss v. Lopez, 419 U.S. 565, 1975) brought by students in the 1950s and 1960s. Supreme court decisions in these cases: a) recognized the importance of a person's right to education, b) prohibited arbitrary or capricious removal of access to education, and c) re-

quired procedural safeguards in the attempt to achieve fairness in decision making about an individual's access to education. Many states and local school districts attempted to make their disciplinary policies conform to the general guidelines laid down in these decisions. As we shall see, these efforts have not proved sufficient to meet the stringent requirements that are set forth by the FAPE, LRE and Procedural Safeguards sections of P.L. 94-142 and Section 504.

Issues Surrounding Disciplinary Exclusion

Overview

Given the present status of law and policy related to the rights to education for handicapped children and the disciplinary exclusion of children from school programs, several questions (issues) emerge which suggest areas of potential conflict in policy or which will require clarification in order to guide school personnel in the development of appropriate discipline policies. These questions, informally organized, include:

1. What is the relationship of a child's behavior to his/her identification as being handicapped, particularly if a child is identified as being seriously emotionally disturbed? Is all of a child's behavior necessarily associated with his/her handicap? Is behavior requiring disciplinary action in and of itself an automatic cause for referral for identification as being emotionally disturbed? For example, if a child identified as being seriously emotionally disturbed assaults a teacher, what are the circumstances, if any, in which that behavior might be unrelated to his/her handicap? If the student was not identified as being seriously emotionally disturbed, would the assault constitute a basis for a referral for such a

classification?

2. Are there any limits to a school's responsibility to provide a free appropriate public education to a handicapped child? What are the restrictions on a school's disciplinary flexibility in dealing with handicapped children? For example, can seriously emotionally disturbed children be expelled? If so, under what circumstances? If not, what options short of expulsion are available?

3. How should disciplinary matters related to handicapped children be decided? Who can make such decisions? Are special procedures required because of the existence of a handicapping condition? If so what are they? Are due process requirements identical for handicapped and non-handicapped children in such matters?

4. What procedural safeguards are required if a school elects exclusion as an alternative?

These are difficult questions. The statutes pertaining to handicapped children do not speak directly to the practice of disciplinary exclusion. Instead, questions concerning the issues that surround the practice are included in several sections of the statutes and regulations of both P.L. 94-142 and Section 504. These sections do not necessarily speak from the same perspective and in some cases appear to be in conflict. Further, state and local laws and policies which are specific to disciplinary exclusion may find themselves at odds with some interpretations of these various federal statutes. For example, federal statute does not make FAPE contingent upon acceptable school behavior, yet it is possible that a handicapped child's behavior would engage disciplinary policies which require expulsion of students exhibiting that behavior. How are

those kinds of conflicts to be resolved?

Judicial and Administrative Influences

Judicial decisions and OCR findings are beginning to build a set of precedent that should serve to guide future actions of school districts relative to disciplinary exclusion of seriously emotionally disturbed students. Many of the above questions have been asked of and addressed by the courts and OCR. It is now in order to review those decisions and findings and to gain a sense of direction relative to these difficult questions. The organization of this section, and much of its content, is credited to the National Center for Law and Education, Inc. Credit is, of course, given for quotes; however, special mention and thanks are in order for the complete and clear research they have done on this topic. The first part of the discussion will center upon the legislation and litigation that forms an overall framework for understanding the disciplinary exclusion issue as it relates to emotionally disturbed students. The second part will return to the previously posed informal questions and respond to those based upon the framework set forth. It should be noted that the full reference for the court cases and OCR findings have not been cited in the body of the paper. The full texts and citations of all cases appear in the appendices.

The National Center for Law and Education, in December, 1980, succintly stated:

> The federal laws safeguarding the rights of students with special needs have implications for disciplining students identified as handicapped, those with evaluations or appeals pending, and students who may be perceived as handicapped, and, in particular, the circumstances under which they can be excluded through disciplinary suspension or other exclusion.
>
> Suspension and expulsion of handicapped students may be illegal under P.L. 94-142, as well as Section 504 of the Rehabi-

litation Act of 1973, and may be illegal for students referred for evaluation or perceived to be handicapped on one of the following grounds:

1) the right to a free appropriate public education which includes specially designed instruction to meet the student's individual needs.

2) the right to have any change in placement occur only through the prescribed procedures.

3) the right to an education in the least restrictive environment with maximum possible interaction with nonhandicapped peers.

4) the right to continuation of the current educational placement during the pendency of any hearing or appeal, or during any proceeding relating to the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education.

5) the right not to be excluded from, denied benefits, aids, or services, or be discriminated against on the basis of one's actual or perceived handicapped status.

For students who have never been classified as handicapped or referred to evaluation:

6) the right not to be excluded from, denied benefits, aids, or services, or be discriminated against on the basis of one's actual or perceived handicapped status.

While FAPE, LRE and Due Process are specifically required in P.L. 94-142, as well as in its regulations, one must look to the implementing regulations of Section 504 in order to see those concepts discussed specifically (see previous section of this paper). This is important to remember, since a ruling by OCR that a district was in violation of Section 504 by denying FAPE (or LRE or Due Process) is not readily apparent simply by looking at the statute itself. The decisions based on each of these grounds will be examined.

1. FAPE has been a central issue in many court cases and OCR com-

plaints. With only few exceptions (Stanley v. School Admin. Unit No. 40, 1980), the courts and OCR have found that exclusion, expulsion, constructive exclusion, and non-emergency suspension violate a handicapped child's right to FAPE. Stuart v. Nappi, 1978, a case heard in U.S. District Court, has proved a persuasive decision, not only in regard to FAPE, but also concerning the other grounds previously listed. Both the decision and the reasoning of that court have been deferred to in numerous ensuing cases. In Stuart v. Nappi the court found that handicapped students (in this case a learning disabled student with concomitant behavioral problems) would be deprived of FAPE by any non-emergency exclusion from her current placement.

The Stuart v. Nappi case brings two additional points to light. Since nonhandicapped students can be excluded (with appropriate due process), must the inappropriate student behavior be related to the handicapping condition in order for FAPE to be violated by that exclusion? Secondly, if only non-emergency exclusion violates FAPE, what constitutes emergency exclusion and how may it be effected upon handicapped students?

As to the first point, there is less than unanimity of the subject. Stuart v. Nappi states that "any non-emergency exclusion, regardless of whether it was for behavior related to the handicapping condition, would deprive a handicapped student" of FAPE (National Center for Law and Education, 1978). (Emphasis added). This reasoning is in contradiction to reasoning used in other cases (S-1 v. Turlington, 1981; Howard v. Friendswood Independent School District, 1978; Doe v. Koger, 1979). These cases seem to suggest that if the behavior of the student was not related to his/her handicap, then the student could be excluded under the same procedures used for nonhandicapped students. Interestingly, however, in only one (Stanley v. School Admin. Unit No. 40) of the 30 or more decisions examined did the

court find that the behavior in question was not related to the handicap. That one case may have been anomalous since little of the criteria used to establish this type of conlcusion were included in any of the other cases. Apparently, it is quite difficult to prove that a child's disruptive behavior is not associated with a handicap, and a presumption that it is, generally holds sway. If this is the case for other handicaps. it would appear to be virtually impossible to be persuasive that this separation could be made for a seriously emotionally disturbed student.

Regarding the second point, what constitutes emergency exclusion, Stuart v. Nappi again reasoned persuasively. The reasoning quotes a comment to 45, C.F.R. 300.513 which states:

> "While the placement may not be changed, this does not preclude a school from using its normal procedures for dealing with children who are endangering themselves or others."

It then goes on to say:

> This somewhat cryptic statement suggests that subsection 1415(e)(3) prohibits disciplinary measures which have the effect of changing a child's placement, while permitting the type of procedures necessary for dealing with a student who appears to be dangerous. This interpretation is supported by a comment-to-the-comment which states that the comment was added to make it clear that schools are permitted to use their regular procedures for dealing with emergencies.

So, although handicapped students cannot be denied FAPE by non-emergency exclusion, emergency exclusion procedures are available and make it clear that:

> "Handicapped children are neither immune from a school's disciplinary process not are they entitled to participate in programs when their behavior impairs the education of other children in the program." (Stuart v. Nappi)

Thus, it appears established that emergency exclusion of handicapped students is permitted so long as due process is followed. More specific

guidelines were established in Mattie T. v. Holladay, 1977, a case heard in Northern District of Mississippi. Emergency conditions exist when:

> the child's behavior represents an immediate physical danger to him/herself or others or constitutes a clear emergency within the school such that removal from school is essential. Such removal shall be for no more than 3 days and shall trigger a formal comprehensive review of the child's I.E.P. If there is disagreement as to the appropriate placement of the child, the child's parents shall be notified in writing of their right to a SPED (Special Education) impartial due process hearing. Serial 3-day removals from SPED are prohibited.

In summary, there would appear to be current judicial support for 1) determining that any non-emergency exclusion of handicapped students violates FAPE; 2) the fact that it is difficult and/or unnecessary to determine if the behavior is related to the handicap (if a child is handicapped then # 1 applies, regardless of a relationship or lack of it to the handicap); and, 3) emergency exclusion of handicapped students is permitted under stringent conditions.

A review of OCR opinions on this topic can be confusing in light of the previous discussion. Often, OCR cites that districts are in violation of Section 504 FAPE regulations for excluding a handicapped student prior to determination by the district as to whether or not the behavior was related to the handicap (Seattle School (WA) District No. 1; Corinth Municipal Separate School District; Lower Snoqualmie Valley School District No. 407; Community (IL) Unit School District Number 300; and Fayette (MO) R-III School District). OCR reasoning is based upon the premise that any reaction (i.e., exclusion) to a student's behavior is in violation of Section 504 only if that behavior is part of a handicapping condition, in which case discrimination based upon a handicapping condition is present. Whether or not this distinction is semantically or factually different from some judicial

decisions is probably a moot issue in that OCR has not, in the 17 complaints reviewed, encountered a circumstance in which the behavior was determined not to be related to the handicap. As mentioned previously, it is apparently quite difficult to prove such a dichotomy. In all complaints on the issue, OCR found FAPE to have been violated under Section 504 if non-emergency exclusion was utilized.

2. Grounds number 2 is based on a combination of statutes. Very specific procedural safeguards are accorded handicapped children in a variety of situations, and change of placement is delineated as one of those situations. Courts have consistently reasoned that disciplinary exclusion constitutes a change of placement (Blue v. New Haven, 1981; S-1 v. Turlington, 1981; Stuart v. Nappi, 1978; Sherry v. New York State, 1979).

Given that, several procedural safeguards apply: 1) parents must receive prior written notice of the change (there are content requirements for that notice); 2) an appropriately constituted IEP committee must re-evaluate the student's IEP (there are specific requirements for this process); and 3) although schools are not required to obtain parental permission prior to change of placement, if parents object to the change, then an opportunity for a due process hearing is required. It should be noted that these safeguards are in addition to the due process procedures required by any suspension or expulsion. Thus, if districts have excluded a handicapped student without following the previously cited safeguards, they have violated that student's legislative rights.

The National Center for Law and Education writes:

> the court (Stuart v. Nappi) rules that the "expulsion of handicapped children ... is inconsistent with the procedures established by the Handicapped Act for changing the placement of disruptive children." 443 F. Supp. at 1243. As noted above, the

the Act does not preclude school authorities from dealing with emergency situations by suspending handicapped students. 443 F. Supp. at 1242-43.

While reiterating this principle as originally set forth in Stuart, the Court of Appeals in S-1 stated that an "expulsion is still a proper disciplinary tool under [P.L. 94-142] and Section 504 when the proper procedures are utilized and under the proper circumstances." 635 F. 2nd at 348. The court emphasized that educational services must continue to be provided during the expulsion period.

The ambiguity between the court's findings that expulsion is a proper disciplinary tool and that educational services must continue to be provided during the expulsion period can be clarified. Expulsion, as the term is used by the court, can be defined as an exclusion of a handicapped student from his/her current (emphasis added) educational placement. This definition is consistent with the court's ruling that an expulsion constitute a change in educational placement triggering the procedural protections of P.L. 94-142. Any attempt by school districts to argue that the court's ruling requires their providing only homebound tutoring should be susceptible to challenge. In most instances, school districts will be unable to show that the student is being provided an appropriate education in the "least restrictive environment" as required under the change in placement procedures.

These decisions would seem to indicate that, except in emergency situations, exclusion from services is a violation of a handicapped student's rights. In the event that ongoing emergency exclusion has occurred other services should be provided and procedural safeguards must be followed.

It should also be noted that, though a child may be excluded under emergency conditions, that too, constitutes a change of placement if it exceeds three days, and thus change of placement safeguards must be provided in addition to the usual due process requirements. Therefore, emergency exclusion is not a means by which a district can initially excluded a child, and then ignore procedural safeguards, since emergency suspension can not be extended or made permanent, but must lead to re-evaluation and placement.

OCR has also found districts in violation of required due process relative to exclusion defined as a change of placement (Seattle (WA) School District No. 1.; Community (IL) Unit School District Number 300).

3. Education in the least restrictive environment is one of the most critical guarantees of Public Law 94-142 and Section 504. This guarantee precludes restrictive placement based on categories of handicapping conditions and allowing placement only based upon individual need. Stated positively, students are to remain with nonhandicapped peers to the greatest extent possible. Both Stuart v. Nappi and Friendswood (also a U.S. District Court decision) utilized LRE as a basis for refusing districts the option of exclusion. Again, we can turn to the text of the Stuart case for clarification:

> An expulsion has the effect not only of changing a student's placement, but also of restricting the availability of alternative placements. For example, plaintiff's expulsion may well exclude her from a placement that is appropriate for her academic and social development. This result flies in the face of the explicit mandate of the Handicapped Act which requires that all placement decisions be made in conformity with a child's right to an education in the least restrictive environment. Id. 443 F. Supp. at 1242-43.

In the cases reviewed, OCR did not use LRE as a basis for determining violations of Section 504 due to disciplinary exclusion. This is not to say that it might not have been possible, simply that OCR was presented with complaints concerning disciplinary exclusion that were couched in terms of denial of FAPE or due process.

4. The right to continuation of the current placement during certain proceedings is guaranteed under P.L. 94-142. Those "certain proceedings" include "provisions concerning any proposal to initiate or change or refusal

to initiate or change the identification, evaluation or placement of the child or the provision of FAPE" (National Center for Law and Education). Two critical points follow here; the first is explicit: since expulsion is a change of placement, any challenge to that "placement" will invoke procedural safeguards which require that the student remain in his/her current placement unless emergency suspension has occurred (Howard v. Friendswood; Stuart v. Nappi). In that case, emergency suspension does not constitute a change of placement unless suspension is for more than 10 cumulative days (National Center for Law and Education). The second point is that this safeguard applies to students who have been referred for evaluation even though they have not been identified as handicapped. This prohibits districts from excluding a student who might reasonably be expected to be handicapped and therefore entitled to the rights under P.L. 94-142. The reasoning for all the above is clearly stated in S-1 v. Turlington (heard in U.S. District Court): "disciplinary proceedings do not supersede the rights of handicapped children under the Handicapped Act".

5 & 6. As previously indicated, OCR investigations of Section 504 violations, and court decisions based upon Section 504 (as well as P.L. 94-142) generally look to the requirements of FAPE, LRE, and due process in determining if Section 504 has been violated. If these three requirements as set forth in the Section 504 regulations have been violated, then discrimination based upon a handicap is determined. These three requirements and OCR/judicial findings have already been presented.

Discussion

With that background in mind, let us turn to the earlier informally

posed questions. They will be considered in the same order in which they were presented.

1. Although some court decisions and OCR rulings have indicated that a behavior must be related to the handicap in order for a handicapped student to receive "special" disciplinary considerations, there are two reasons why there does not appear to be a need to pursue this line of thought: a) even among court decisions and OCR rulings that maintain this reasoning, only one of 30 court cases and none of 17 OCR findings reviewed were able to make a distinction between the disruptive behavior and the child's handicapping condition; and b) Stuart v. Nappi argues persuasively that the issue is irrelevant since a handicapped student cannot, under any circumstances, be denied FAPE, and exclusion does just that.

There is not a body of judicial or administrative decisions to suggest that any behavior which warrents disciplinary action should also require a referral for evaluation as a possible handicapping condition. However, if referral for evaluation has occurred prior to the behavior event, then procedural safeguards accorded handicapped students are extended to the referred student. Some courts have not heald this opinion (Mrs. A.J. v. Special School District No. 1), but it appears that the movement is in favor of extending these safeguards to referred students.

2. A school may never deny FAPE to a handicapped student. The school's flexibility lies in: a) emergency suspension followed by processes to assure FAPE; b) re-evaluation of IEPs prior to exclusion (as due process requires) and the opportunity to determine if another placement is more suitable for a student; and c) provision of appropriate services during an exclusion from current placement.

3. Due process requirements are not identical for handicapped and nonhandicapped. P.L. 94-142 and Section 504 accord additional due process rights to handicapped students. Disciplinary matters should be decided in evaluation or reevaluation staffings which occur because of the need to consider change of placement.

The key decision makers in these kinds of disciplinary matters appear to be the appropriately constituted IEP committee as defined by relevant EHA regulations at federal, state, and local levels. This committee is vested with what appears to be the critical decision in these cases -- the appropriateness of placement. The appropriateness issue also hinges on the content of the IEP since it is in the specific goals and objectives listed that the effectiveness of the IEP must be evaluated. Most of the judicial and OCR decisions examined referred the ultimate decision about appropriate placement back to the IEP committee. It should be noted that precedent has been set which indicates that school boards, who have traditionally exercised final decision making on school exclusion, are not the appropriate decision makers for handicapped students (S-1 v. Burlington). The rationale is that school board officials lack the necessary expertise to determine appropriateness of placement for handicapped students.

As of this writing, exclusion, with the exception of temporary suspension of no more than 10-15 days cumulative per school year (P-1 v. Shedd consent decree), is universally considered to be a change of placement for handicapped children triggering EHA and Section 504 protection. Serial suspension is frowned upon (Mattie v. Holladay) since the intent of suspension is to deal with emergencies, and the use of serial suspension does not appear consistent with this intent. The inclusion of expulsion

or other disciplinary procedures as a part of a student's IEP is deemed permissible so long as the IEP is individualized to meet specific individual needs and is not a vehicle for circumventing the FAPE protection of federal law. Both suspension and expulsion are generally considered to be proper disciplinary tools under EHA and Section 504 so long as: 1) they are appropriately included in a student's IEP; 2) follow the procedural requirements of EHA and Section 504; and, 3) do not result in a complete and permanent cessation of provision of education services (S-1 v. Turlington).

4. The procedural safeguards outlined in P.L. 94-142 and Section 504 are required either prior to or concomitant with any form of exclusion.

Summary

Barring decisions or rulings by the courts or OCR which depart radically from current positions, past decisions can be meshed and synthesized to produce a broad framework and some concrete direction for local districts to utilize as they face disciplinary issues involving handicapped students. The framework and concrete direction, as provided by the court decisions and OCR, are consistent within certain parameters. These directions would indicate to school districts that 1) it is probable that any permanent exclusion of a handicapped student violates the FAPE requirement, and 2) the procedural safeguards outlined in previous case law that affect all students, in P.L. 94-142, and in Section 504 must be applied to handicapped students in all cases where any type of exclusion, emergency or otherwise, is contemplated. These two directions, used as guiding principles, will go a long way toward assuring the guaranteed rights of handicapped students.

If local school systems were to revise their overall disciplinary policies in such a way as to take into account the thrust of the decisions described and analyzed in this paper, they may avoid potential conflict and

litigation as well as the need to establish dual disciplinary systems, i.e., one for the handicapped and one for the nonhandicapped.

Issues Not Yet Addressed

Several issues exist which have either not been addressed, or have not been addressed sufficiently to discuss a clear thrust of interpretation. These will likely continue to be clarified in upcoming decisions. The fact that Section 504 specifically includes alcoholism and chemical dependency as handicapping conditions (and its general broad inclusiveness of definition of handicaps) is something which has not yet received attention relative to discipline. These types of behavior are often some of the very ones which specifically involve disciplinary action. Another controversial area will be criteria used to establish "appropriate" placement in the least restrictive environment given the propensity of a child to behave in ways likely to have disciplinary consequences, and whether IEPs could/should routinely include disciplinary procedures. This area is squarely the responsibility of the IEP committee and, thus, might best be resolved through professional rather than judicial means. Judges will likely be hesitant to become involved in these types of issues, although a lack of professional attention could provoke judicial intervention. An extremely difficult question that has surfaced in some court findings and may become increasingly prominent is that of whether or not exclusion was due to inappropriate behavior that resulted from an inappropriate placement. If so, how does this fact affect decisions concerning the exclusion and liabilities resulting from the exclusion. Yet another question which has not been addressed is the manner in which the "rules" that govern disciplinary exclusion might also apply to disciplinary in-school suspensions. A final unaddressed issue is one concerning what,

if any, effect would result from a change in the P.L. 94-142 or Section 504 statutes or regulations. Given the current political climate, such changes are a possibility. Were they to occur, the basis for some of the legal precedents could be undermined.

Due to the limitless scope of situations potentially placing handicapped children in disciplinary situations, it is difficult to predict what other unresolved issues will surface. It would appear, however, that many of the foundational judicial interpretations of federal policy in the area of disciplinary exclusion of handicapped children have been established, requiring only further elaboration and detail, rather than entirely new thrusts.

References

Grosenick, J. and Huntze, S. National Needs Analysis in Behavior Disorders: Adolescent Behavior Disorders. Columbia, MO.: Department of Special Education, University of Missouri, 1980.

Grosenick, J. and Huntze S. National Needs Analysis in Behavior Disorders: Severe Behavior Disorders. Columbia, MO.: Department of Special Education, University of Missouri, 1980.

Grosenick, J., Huntze, S., Kochan, B., Peterson, R., Robertshaw, C.S., and Wood, F. Working Paper: Legislation, Litigation and the Handicapped. Columbia, MO.: Department of Special Education, University of Missouri, 1981.

National Center for Law and Education,Inc. Excerpt from Letter of Comment on Notice of Intent To Develop Regulations, Interpretative Rules, or Policy Statements. Cambridge, MA., 1980.

Regal, J., Elliott, R., Grossman, H., and Morse, W. The Exclusion of Children from School. Reston, VA: Council for Children with Behavior Disorders, 1972.

The 13th Annual Gallup Poll of the Public's Attitude Toward the Public Schools. Phi Delta Kappan, 1981, 63, 33-47.

APPENDICES

The full text of statutes, regulations, court cases and OCR findings that were cited in the body of this paper are included in the appendices. The organization is as follows:

Appendix A: Public Law 94-142 (Selected Statutes) and Related Sections of Implementing Regulations

Appendix B: Section 504 and Related Section of Implementing Regulation

Appendix C: Annotated Court Cases

Appendix D: Court Cases: Full Text

Appendix E: Summary of OCR Complaint LOFS

Appendix F: OCR Complaint LOFS: Full Text

The Education for the Handicapped Law Report is the source of most of the above texts. Their permission and cooperation in making these texts available is greatly appreciated.

APPENDIX A

PUBLIC LAW 94-142 (SELECTED STATUTES) AND RELATED SECTIONS OF IMPLEMENTING REGULATIONS

PUBLIC LAW 94-142 (SELECTED STATUTES) AND RELATED SECTIONS OF IMPLEMENTING REGULATIONS

§ 1401(18). ["Free appropriate public education"]

—LAW—

(18) The term "free appropriate public education" means special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title.

REGULATIONS

Reg. 300.4 Free appropriate public education.

As used in this part, the term "free appropriate public education" means special education and related services which:

(a) Are provided at public expense, under public supervision and direction, and without charge.

(b) Meet the standards of the State educational agency, including the requirements of this part,

(c) Include preschool, elementary school, or secondary school education in the State involved, and

(d) Are provided in conformity with an individualized education program which meets the requirements under Regs. 300.340—300.349 of Subpart C.

Reg. 300.301 Free appropriate public education—methods and payments.

(a) Each State may use whatever State, local, Federal, and private sources of support are available in the State to meet the requirements of this part. For example, when it is necessary to place a handicapped child in a residential facility, a State could use joint agreements between the agencies involved for sharing the cost of that placement.

(b) Nothing in this part relieves an insurer or similar third party from an otherwise valid obligation to provide or to pay for services provided to a handicapped child.

§ 1412(5)(B). [Least restrictive environment]

—LAW—

(B) procedures to assure that, to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and that special classes, separate schooling, or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily, and

REGULATIONS

Reg. 300.132 Least restrictive environment.

(a) Each annual program plan must include procedures which insure that the requirements in Regs. 300.550-300.556 of Subpart E are met.

(b) Each annual program plan must include the following information:

(1) The number of handicapped children in the State, within each disability category, who are participating in regular education programs, consistent with Regs. 300.550-300.556 of Subpart E.

(2) The number of handicapped children who are in separate classes or separate school facilities, or who are otherwise removed from the regular education environment.

Reg. 300.305 Program options.

Each public agency shall take steps to insure that its handicapped children have available to them the variety of educational programs and services available to nonhandicapped

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children in the area served by the agency, including art, music, industrial arts, consumer and homemaking education, and vocational education.

Comment. The above list of program options is not exhaustive, and could include any program or activity in which nonhandicapped students participate. Moreover, vocational education programs must be specially designed if necessary to enable a handicapped student to benefit fully from those programs; and the set-aside funds under the Vocational Education Act of 1963, as amended by Pub. L. 94-482, may be used for this purpose. Part B funds may also be used, subject to the priority requirements under Regs 300.320-300.324.

Reg. 300.306 Nonacademic services.

(a) Each public agency shall take steps to provide nonacademic and extracurricular services and activities in such manner as is necessary to afford handicapped children an equal opportunity for participation in those services and activities.

(b) Nonacademic and extracurricular services and activities may include counseling services, athletics, transportation, health services, recreational activities, special interest groups or clubs sponsored by the public agency, referrals to agencies which provide assistance to handicapped persons, and employment of students, including both employment by the public agency and assistance in making outside employment available.

Reg. 300.307 Physical education.

(a) *General.* Physical education services, specially designed if necessary, must be made available to every handicapped child receiving a free appropriate public education.

(b) *Regular physical education.* Each handicapped child must be afforded the opportunity to participate in the regular physical education program available to nonhandicapped children unless:

(1) The child is enrolled full time in a separate facility; or

(2) The child needs specially designed physical education, as prescribed in the child's individualized education program.

(c) *Special physical education.* If specially designed physical education is prescribed in a child's individualized education program, the public agency responsible for the education of that child shall provide the services directly, or make arrangements for it to be provided through other public or private programs.

(d) *Education in separate facilities.* The public agency responsible for the education of a handicapped child who is enrolled in a separate facility shall insure that the child receives appropriate physical education services in compliance with paragraphs (a) and (c) of this section.

Comment. The Report of the House of Representatives on Pub. L. 94-142 includes the following statement regarding physical education:

Special education as set forth in the Committee bill includes instruction in physical education, which is provided as a matter of course to all nonhandicapped children enrolled in public elementary and secondary schools. The Committee is concerned that although these services are available to and required of all children in our school systems, they are often viewed as a luxury for handicapped children.

* * *

The Committee expects the Commissioner of Education to take whatever action is necessary to assure that physical education services are available to all handicapped children, and has specifically included physical education within the definition of special education to make clear that the Committee expects such services, specially designed where necessary, to be provided as an integral part of the educational program of every handicapped child.

Reg. 300.533 Placement procedures.

(a) In interpreting evaluation data and in making placement decisions, each public agency shall:

(1) Draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior;

(2) Insure that information obtained from all of these sources is documented and carefully considered;

(3) Insure that the placement decision is made by a group of persons, including persons knowledgeable about the child, the meaning of the valuation data, and the placement options; and

(4) Insure that the placement decision is made in conformity with the least restrictive environment rules in Regs. 300.550-300.554.

(b) If a determination is made that a child is handicapped and needs special education and related services, an individualized education program must be developed for the child in accordance with Regs. 300.340-300.349 of Subpart C.

Comment. Paragraph (a)(1) includes a list of examples of sources that may be used by a public agency in making placement decisions. The agency would not have to use all the sources in every instance. The point of the requirement is to insure that more than one source is used in interpreting evaluation data and in making placement decisions. For example, while all of the named sources would have to be used for a child whose suspected disability is mental retardation, they would not be necessary for certain other handicapped children, such as a child who has a severe articulation disorder as his primary handicap. For such a child, the speech-language pathologist, in complying with the multisource requirement, might use (1) a standardized test of articulation, and (2) observation of the child's articulation behavior in conversational speech.

Reg. 300.550 General.

(a) Each State educational agency shall insure that each public agency establishes and implements procedures which meet the requirements of Regs. 300.550-300.556.

(b) Each public agency shall insure:

(1) That to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and

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(2) That special classes, separate schooling or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

Reg. 300.551 Continuum of alternative placements.

(a) Each public agency shall insure that a continuum of alternative placements is available to meet the needs of handicapped children for special education and related services.

(b) The continuum required under paragraph (a) of this section must:

(1) Include the alternative placements listed in the definition of special education under Reg. 300.13 of Subpart A (instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions), and

(2) Make provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement.

Reg. 300.552 Placements.

Each public agency shall insure that:

(a) Each handicapped child's educational placement: (1) Is determined at least annually,

(2) Is based on his or her individualized education program, and

(3) Is as close as possible to the child's home;

(b) The various alternative placements included under Reg. 300.551 are available to the extent necessary to implement the individualized education program for each handicapped child;

(c) Unless a handicapped child's individualized education program requires some other arrangement, the child is educated in the school which he or she would attend if not handicapped; and

(d) In selecting the least restrictive environment, consideration is given to any potential harmful effect on the child or on the quality of services which he or she needs.

Comment. Reg. 300.552 includes some of the main factors which must be considered in determining the extent to which a handicapped child can be educated with children who are not handicapped. The overriding rule in this section is that placement decisions must be made on an individual basis. The section also requires each agency to have various alternative placements available in order to insure that each handicapped child receives an education which is appropriate to his or her individual needs.

The analysis of the regulations for Section 504 of the Rehabilitation Act of 1973 (34 CFR Part 104—Appendix, Paragraph 24) includes several points regarding educational placements of handicapped children which are pertinent to this section:

1. With respect to determining proper placements, the analysis states: "* * * it should be stressed that, where a handicapped child is so disruptive in a regular classroom that the education of other students is significantly impaired, the needs of the handicapped child cannot be met in that environment. Therefore regular placement would not be appropriate to his or her need * * *."

2. With respect to placing a handicapped child in an alternate setting, the analysis states that among the factors to be considered in placing a child is the need to place the child as close to home as possible. Recipients are required to take this factor into account in making placement decisions. The parents' right to challenge the placement of their child extends not only to placement in special classes or separate schools, but also to placement in a distant school, particularly in a residential program. An equally appropriate education program may exist closer to home; and this issue may be raised by the parent under the due process provisions of this subject.

Reg. 300.553 Non-academic settings.

In providing or arranging for the provision of non-academic and extra-curricular services and activities, including meals, recess periods, and the services and activities set forth in Reg. 300.306 of Subpart C, each public agency shall insure that each handicapped child participates with non-handicapped children in those services and activities to the maximum extent appropriate to the needs of that child.

Comment. Reg. 300.553 is taken from a new requirement in the final regulations for Section 504 of the Rehabilitation Act of 1973. With respect to this requirement, the analysis of the Section 504 Regulations includes the following statement: "[A new paragraph] specifies that handicapped children must also be provided non-academic services in as integrated a setting as possible. This requirement is especially important for children whose educational needs necessitate their being solely with other handicapped children during most of each day. To the maximum extent appropriate, children in residential settings are also to be provided opportunities for participation with other children." (34 CFR Part 104—Appendix, Paragraph 24.)

Reg. 300.554 Children in public or private institutions.

Each State educational agency shall make arrangements with public and private institutions (such as a memorandum of agreement or special implementation procedures) as may be necessary to insure that Reg. 300.550 is effectively implemented.

Comment. Under Section 612(5)(B) of the statute, the requirement to educate handicapped children with nonhandicapped children also applies to children in public and private institutions or other care facilities. Each State educational agency must insure that each applicable agency and institution in the State implements this requirement. Regardless of other reasons for institutional place-

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ment, no child in an institution who is capable of education in a regular public school setting may be denied access to an education in that setting.

Reg. 300.555 Technical assistance and training activities.

Each State educational agency shall carry out activities to insure that teachers and administrators in all public agencies:

(a) Are fully informed about their responsibilities for implementing Reg. 300.550, and

(b) Are provided with technical assistance and training necessary to assist them in this effort.

Reg. 300.556 Monitoring activities.

(a) The State educational agency shall carry out activities to insure that Reg. 300.550 is implemented by each public agency.

(b) If there is evidence that a public agency makes placements that are inconsistent with Reg. 300.550 of this subpart, the State educational agency:

(1) Shall review the public agency's justification for its actions, and

(2) Shall assist in planning and implementing any necessary corrective action.

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§ 1415. Procedural safeguards

§ 1415(a). [Establishment and maintenance]

—LAW—

(a) Any State educational agency, any local educational agency, and any intermediate educational unit which receives assistance under this subchapter shall establish and maintain procedures in accordance with subsection (b) through subsection (e) of this section to assure that handicapped children and their parents or guardians are guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies and units.

REGULATIONS

Reg. 300.10 Parent.

As used in this part, the term "parent" means a parent, a guardian, a person acting as a parent of a child, or a surrogate parent who has been appointed in accordance with Reg. 300.514. The term does not include the State if the child is a ward of the State.

Comment The term "parent" is defined to include persons acting in the place of a parent, such as a grandmother or stepparent with whom a child lives, as well as persons who are legally responsible for a child's welfare.

Reg. 300.514 Surrogate parents.

(a) *General*. Each public agency shall insure that the rights of a child are protected when:

(1) No parent (as defined in Reg. 300.10) can be identified;

(2) The public agency, after reasonable efforts, cannot discover the whereabouts of a parent; or

(3) The child is a ward of the State under the laws of that State.

(b) *Duty of public agency*. The duty of a public agency under paragraph (a) of this section includes the assignment of an individual to act as a surrogate for the parents. This must include a method (1) for determining whether a child needs a surrogate parent, and (2) for assigning a surrogate parent to the child.

(c) *Criteria for selection of surrogates*. (1) The public agency may select a surrogate parent in any way permitted under State law.

(2) Public agencies shall insure that a person selected as a surrogate:

(i) Has no interest that conflicts with the interest of the child he or she represents; and

(ii) Has knowledge and skills, that insure adequate representation of the child.

(d) *Non-employee requirement; compensation*. (1) A person assigned as a surrogate may not be an employee of a public agency which is involved in the education or care of the child.

(2) A person who otherwise qualifies to be a surrogate parent under paragraph (e) and (d)(1) of this section, is not an employee of the agency solely because he or she is paid by the agency to serve as surrogate parent.

(e) *Responsibilities*. The surrogate parent may represent the child in all matters relating to:

(1) The identification, evaluation, and educational placement of the child, and

(2) The provision of a free appropriate public education to the child.

Reg. 300.500 Definitions of "consent," "evaluation," and "personally identifiable."

As used in this part: "Consent" means that: (a) The parent has been fully informed of all information relevant to the activity for which consent is sought, in his or her native language, or other mode of communication;

(b) The parent understands and agrees in writing to the carrying out of the activity for which his or her consent is sought, and the consent describes that activity and lists the records (if any) which will be released and to whom; and

(c) The parent understands that the granting of consent is voluntary on the part of the parent and may be revoked at any time.

"Evaluation" means procedures used in accordance with Regs. 300.530-300.534 to determine whether a child is handicapped and the nature and extent of the special education and related services that the child needs. The term means procedures used selectively with an individual child and does not include basic tests administered to or procedures used with all children in a school, grade, or class.

"Personally identifiable" means that information includes:

(a) The name of the child, the child's parent, or other family member;

(b) The address of the child;

(c) A personal identifier, such as the child's social security number or student number; or

(d) A list of personal characteristics or other information which would make it possible to identify the child with reasonable certainty.

Reg. 300.501 General responsibility of public agencies.

Each State educational agency shall insure that each public agency establishes and implements procedural safeguards which meet the requirements of Regs. 300.500-300.514.

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§ 1415(b)(1)(C). [Prior written notice]

—LAW—

(C) written prior notice to the parents or guardian of the child whenever such agency or unit—

(i) proposes to initiate or change, or

(ii) refuses to initiate or change,

the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child;

REGULATIONS

Reg. 300.504 Prior notice; parent consent.

(a) *Notice*. Written notice which meets the requirements under Reg. 300.505 must be given to the parents of a handicapped child a reasonable time before the public agency:

(1) Proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child, or

(2) Refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child.

(b) *Consent*. (1) Parental consent must be obtained before:

(i) Conducting a preplacement evaluation; and

(ii) Initial placement of a handicapped child in a program providing special education and related services.

(2) Except for preplacement evaluation and initial placement, consent may not be required as a condition of any benefit to the parent or child.

(c) *Procedures where parent refuses consent*. (1) Where State law requires parental consent before a handicapped child is evaluated or initially provided special education and related services, State procedures govern the public agency in overriding a parent's refusal to consent.

(2)(i) Where there is no State law requiring consent before a handicapped child is evaluated or initially provided special education and related services, the public agency may use the hearing procedures in Regs. 300.506-300.508 to determine if the child may be evaluated or initially provided special education and related services without parental consent.

(ii) If the hearing officer upholds the agency, the agency may evaluate or initially provide special education and related services to the child without the parent's consent, subject to the parent's rights under Regs. 300.510-300.513.

Comment. 1. Any changes in a child's special education program, after the initial placement, are not subject to parental consent under Part B, but are subject to the prior notice requirement in paragraph (a) and the individualized education program requirements in Subpart C.

2. Paragraph (c) means that where State law requires parental consent before evaluation or before special education and related services are initially provided, and the parent refuses (or otherwise withholds) consent, State procedures, such as obtaining a court order authorizing the public agency to conduct the evaluation or provide the education and related services, must be followed.

If, however, there is no legal requirement for consent outside of these regulations, the public agency may use the due process procedures under this subpart to obtain a decision to allow the evaluation or services without parental consent. The agency must notify the parent of its actions, and the parent has appeal rights as well as rights at the hearing itself.

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§1415(e)(3). [Child placement during proceedings]

—LAW—

(3) During the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents or guardian, be placed in the public school program until all such proceedings have been completed.

REGULATIONS

Reg. 300.513 Child's status during proceedings.

(a) During the pendency of any administrative or judicial proceeding regarding a complaint, unless the public agency and the parents of the child agree otherwise, the child involved in the complaint must remain in his or her present educational placement.

(b) If the complaint involves an application for initial admission to public school, the child, with the consent of the parents, must be placed in the public school program until the completion of all the proceedings.

Comment. Section 300.513 does not permit a child's placement to be changed during a complaint proceeding, unless the parents and agency agree otherwise. While the placement may not be changed, this does not preclude the agency from using its normal procedures for dealing with children who are endangering themselves or others.

§1415(e)(4). [Jurisdiction of U.S. district courts]

(4) The district courts of the United States shall have jurisdiction of actions brought under this subsection without regard to the amount in controversy.

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APPENDIX B

SECTION 504 AND RELATED SECTIONS OF IMPLEMENTING REGULATIONS

APPENDIX B

SECTION 504 AND RELATED SECTIONS OF IMPLEMENTING REGULATIONS

§ 794. Nondiscrimination under Federal grants and programs.

No otherwise qualified handicapped individual in the United States, as defined in section 706(6) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

Pub. L. 93-112, Title V, § 504, Sept. 26, 1973, 87 Stat. 394; amended Pub. L. 95-602, Title I § 119, Nov. 9, 1978, 92 Stat. 2982.

Reg. 104.33 Free appropriate public education.

(a) *General.* A recipient that operates a public elementary or secondary education program shall provide a free appropriate public education to each qualified handicapped person who is in the recipient's jurisdiction, regardless of the nature or severity of the person's handicap.

(b) *Appropriate education.* (1) For the purpose of this subpart, the provision of an appropriate education is the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met and (ii) are based upon adherence to procedures that satisfy the requirements of Regs. 104.34, 104.35, and 104.36.

(2) Implementation of an individualized education program developed in accordance with the Education of the Handicapped Act is one means of meeting the standard established in paragraph (b)(1)(i) of this section.

(3) A recipient may place a handicapped person in or refer such person to a program other than the one that it operates as its means of carrying out the requirements of this subpart. If so, the recipient remains responsible for ensuring that the requirements of this subpart are met with respect to any handicapped person so placed or referred.

(c) *Free education*—(1) *General.* For the purpose of this section, the provision of a free education is the provision of educational and related services without cost to the handicapped person or to his or her parents or guardian, except for those fees that are imposed on nonhandicapped persons or their parents or guardian. It may consist either of the provision of free services or, if a recipient places a handicapped person in or refers such person to a program not operated by the recipient as its means of carrying out the requirements of this subpart, of payment for the costs of the program. Funds available from any public or private agency may be used to meet the requirements of this subpart. Nothing in this section shall be construed to relieve an insurer or similar third party from an otherwise valid obligation to provide or pay for services provided to a handicapped person.

(2) *Transportation.* If a recipient places a handicapped person in or refers such person to a program not operated by the recipient as its means of carrying out the requirements of this subpart, the recipient shall ensure that adequate transportation to and from the program is provided at no greater cost than would be incurred by the person or his or her parents or guardian if the person were placed in the program operated by the recipient.

(3) *Residential placement.* If placement in a public or private residential program is necessary to provide a free appropriate public education to a handicapped person because of his or her handicap, the program, including nonmedical care and room and board, shall be provided at no cost to the person or his or her parents or guardian.

(4) *Placement of handicapped persons by parents.* If a recipient has made available, in conformance with the requirements of this section and Reg. 104.34, a free appropriate public education to a handicapped person and the person's parents or guardian choose to place the person in a private school, the recipient is not required to pay for the person's education in the private school. Disagreements between a parent or guardian and a recipient regarding whether the recipient has made such a program available or otherwise regarding the question of financial responsibility are subject to the due process procedures of Reg. 104.36.

(d) *Compliance.* A recipient may not exclude any qualified handicapped person from a public elementary or secondary education after the effective date of this part. A recipient that is not, on the effective date of this regulation, in full compliance with the other requirements of the preceding paragraphs of this section shall meet such requirements at the earliest practicable time and in no event later than September 1, 1978.

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Reg. 104.34 Educational setting.

(a) *Academic setting.* A recipient to which this subpart applies shall educate, or shall provide for the education of, each qualified handicapped person in its jurisdiction with persons who are not handicapped to the maximum extent appropriate to the needs of the handicapped person. A recipient shall place a handicapped person in the regular educational environment operated by the recipient unless it is demonstrated by the recipient that the education of the person in the regular environment with the use of supplementary aids and services cannot be achieved satisfactorily. Whenever a recipient places a person in a setting other than the regular educational environment pursuant to this paragraph, it shall take into account the proximity of the alternate setting to the person's home.

(b) *Nonacademic settings.* In providing or arranging for the provision of nonacademic and extracurricular services and activities, including meals, recess periods, and the services and activities set forth in Reg. 104.37(a)(2), a recipient shall ensure that handicapped persons participate with nonhandicapped persons in such activities and services to the maximum extent appropriate to the needs of the handicapped person in question.

(c) *Comparable facilities.* If a recipient, in compliance with paragraph (a) of this section, operates a facility that is identifiable as being for handicapped persons, the recipient shall ensure that the facility and the services and activities provided therein are comparable to the other facilities, services, and activities of the recipient.

Reg. 104.36 Procedural safeguards.

A recipient that operates a public elementary or secondary education program shall establish and implement, with respect to actions regarding the identification, evaluation, or educational placement of persons who, because of handicap, need or are believed to need special instruction or related services, a system of procedural safeguards that includes notice, an opportunity for the parents or guardian of the person to examine relevant records, an impartial hearing with opportunity for participation by the person's parents or guardian and representation by counsel, and a review procedure. Compliance with the procedural safeguards of section 615 of the Education of the Handicapped Act is one means of meeting this requirement.

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APPENDIX C

ANNOTATED COURT CASES

APPENDIX C

ANNOTATED COURT CASES

JOHN BLUE,

v.

New Haven Board of Education, *et al.*,

No. N 81-41

United States District Court, Connecticut

March 23, 1981

Ellen Bree Burns, District Judge

Motion for preliminary injunction to restrain board of education from conducting any expulsion hearing or taking any other steps to expel student from school, and to direct his reinstatement into special education program or some other suitable program pending a final determination on the merits. Following suspension of child because, *inter alia*, of altercation with teacher, principal recommended that school board expel child. Planning and placement team recommended homebound instruction until expulsion hearing was conducted and continuation of homebound instruction or placement at Trowbridge School if child was expelled. Parent obtained temporary restraining order preventing child's expulsion pending hearing on motion for preliminary injunction.

HELD, plaintiff has made a persuasive showing of irreparable harm and likelihood of success on the merits and is entitled to preliminary injunction. Any attempt by LEA to expel child from school or otherwise change his educational placement during the pendency of his special education complaint would violate 20 U.S.C. § 1415(e)(3). Since the child has already been excluded for more than 10 consecutive days and, under Connecticut law, such an exclusion is tantamount to an expulsion, child is being denied right to remain in his present education placement during the pendency of his special education complaint. Child is entitled to have his educational placement changed by the PPT, and not through the school's normal disciplinary procedures, and to have any PPT placement decision reviewed pursuant to the procedures contained in 20 U.S.C. § 1415(b)-(e). Moreover, homebound instruction pending expulsion and, following expulsion, either continuing that instruction or placement at Trowbridge deprive child of his right to an education in the least restrictive environment.

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JANE DOE, on behalf of her minor son, DENNIS DOE, Individually and on behalf of all other persons similary situated,
Plaintiffs

v.

KENNETH J. KOGER, Individually and in his capacity as Superintendent of the School City of Mishawaka; JOHN SHOTTS, Individually and as Director of Special Education for the School City of Mishawaka; RONALD KRONEWITTER, GEORGE VERNASCO, ELVIRA TRIMBOLI, SAMUEL MERCANTINI and ROSEMARY SPALDING, Individually and in their official capacity as Members of the Board of School Trustees of the School City of Mishawaka; HAROLD H. NEGLEY, in his official capacity as Indiana Superintendent of Public Instruction; and GILBERT BLITON, in his official capacity as Director of Special Education for the State Department of Public Instruction,
Defendants.

Civ. A. No. S 79-14

United States District Court
N.D. Indiana
South Bend Division

November 21, 1979

Supplementary Entry December 3, 1979

Allen Sharp, District Judge

Counsel for Plaintiffs: Kyle M. Payne, Legal Services Program of Northern Indiana, Inc., South Bend, Indiana

Counsel for Defendants: Theodore L. Sendak, Attorney General of Indiana, Ronald J. Semler, Deputy Attorney General, Indianapolis, Indiana, James J. Olson, Mishawaka, Indiana

Action by "mildly mentally handicapped" student and his mother alleging that expulsion from school violated student's rights under Education of the Handicapped Act, 20 U.S.C. §§ 1401 *et seq.*, EHA regulations, and Equal Protection Clause of 14th Amendment. Student was suspended with recommendation for expulsion and was expelled for remainder of school year following expulsion hearing. Student's attorney indicated that expulsion would be appealed and requested Rule S-1 hearing. Rule S-1 is State regulation establishing, among other things, specific procedures to be used in placement of mildly mentally handicapped students and other students needing special education. Shortly thereafter, parties agreed that, pending further legal action, student would be placed in interim educational program, which he was. This action followed.

HELD, students whose handicaps caused them to be disruptive cannot be expelled or indefinitely suspended; the school is allowed only to transfer the student to an appropriate, more restrictive environment. Whether a child's handicap is the cause of the child's propensity to disrupt must be determined through the change of placement procedures required by EHA. To subject handicapped students to the same disciplinary expulsions as other students is not to invidiously discriminate against the handicapped in violation of the Equal Protection Clause of the 14th Amendment.

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HOWARD S. et al., Plaintiffs,

v.

FRIENDSWOOD INDEPENDENT SCHOOL DISTRICT et al., Defendants.

Civ. A. No. G-78-92.

United States District Court, S. D. Texas, Galveston Division.

June 23, 1978.

Parents of handicapped minor sought injunctive relief to insure that minor received necessary and appropriate treatment and education. On motion for preliminary injunction, the District Court, Cowan, J., held that school district violated its legal obligations under the Rehabilitation Act of 1976 and under the Fifth and Fourteenth Amendments with respect to high school student who had minimal brain damage and emotional problems and failed to provide constitutionally required hearings with respect to student's constructive expulsion mandating issuance of preliminary injunction requiring school district to pay cost of student's private schooling necessitated by his difficulties.

Order accordingly.

1. Schools and School Districts ⇐148

Regulations issued by the Secretary of Health, Education and Welfare under the Rehabilitation Act of 1973, the Education for All Handicapped Children Act of 1975, and the amendments of 1974 are reasonably related to the purposes of the enabling legislation. Rehabilitation Act of 1973, § 504, 29 U.S.C.A. § 794; Education of the Handicapped Act, § 602 as amended 20 U.S.C.A. § 1401.

2. Civil Rights ⇐13.4(1)
Schools and School Districts ⇐115

The Civil Rights Act and the Rehabilitation Act of 1973 afford a private cause of action to handicapped students who are denied necessary and appropriate treatment and education. 42 U.S.C.A. § 1983; Rehabilitation Act of 1973, § 504, 29 U.S.C.A. § 794.

3. Injunction ⇐147

For purposes of preliminary injunction, evidence established that school district violated its legal obligations under the Rehabilitation Act of 1973 and under the Fifth and Fourteenth Amendments with respect to high school student who had minimal brain damage and emotional problems and failed to provide constitutionally required hearings with respect to student's constructive expulsion, mandating issuance of preliminary injunction requiring a school district to pay cost of student's private schooling necessitated by his difficulties. Rehabilitation Act of 1973, § 504, 29 U.S.C.A. § 794; U.S.C.A.Const. Amends. 5, 14.

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MATTIE T., *et al.*,
Plaintiffs

v.

CHARLES E. HOLLADAY, *et al.*,
Defendants

Civil Action
No. DC-75-31-s

Northern District of Mississippi
Delta Division
ORMA R. SMITH, District Judge

January 26, 1979

Class action was on behalf of all school children in the State of Mississippi who are handicapped or regarded by their schools as handicapped. Plaintiffs asserted that the special education policies and practices of the state and local defendant officials violated their rights under the Education of the Handicapped Act, Section 504 of the Rehabilitation Act of 1973, as amended, Title I of the Elementary and Secondary Education Act of 1965, and the equal protection and due process clauses of the Fourteenth Amendment to the United States Constitution. Summary judgment was granted for the plaintiffs, the court declaring, *inter alia*, that the defendants had violated the plaintiffs' rights under EHA to 1) procedural safeguards; 2) racially and culturally non-discriminatory tests and procedures used to classify them as handicapped and place them in special education programs; 3) educational placement in the least restrictive environment; and 4) a program to locate and identify all handicapped children in the state in need of special education services. Consent agreement developed pursuant to court's order specifies the policies, monitoring procedures and enforcement mechanisms to be implemented by the state defendants to remedy the violations found by the court.

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MRS. A. J., on behalf of herself and her daughter, K. J.,
Plaintiff

v.

SPECIAL SCHOOL DISTRICT NO. 1,
Defendant

Civ. No. 4-77-192

United States District Court
D. Minnesota, Fourth Division

October 12, 1979

MacLaughlin, District Judge

Counsel for Plaintiff: William F. Messinger, Minneapolis, MN; James E. Wilkinson, III, Coalition for the Protection of Youth Rights, Central Minnesota Legal Services, Minneapolis, MN

Counsel for Defendant: Frederick E. Finch, Fredrikson, Byron, Colborn, Bisbee & Hansen, P.A., Minneapolis, MN

Action brought pursuant to 42 U.S.C. § 1983 to challenge the lawfulness of procedures utilized by a school district (LEA) in the 15-day suspension of a child for disciplinary reasons. The plaintiffs, a mother and her daughter, alleged that the LEA did not comply with the State's "Pupil Fair Dismissal Act," Minn. St. §§ 127.26 - 127.39, or with Federal and State statutes concerning handicapped students. At the time of her suspension, the student was the subject of an ongoing "formal educational assessment," as defined in State statutes and regulations, but was not being treated as a special education student or handicapped child by the LEA; nor had the ongoing assessment process yet culminated in any identification of the student as a handicapped child or any proposed course of action as to her future educational placement. Plaintiff sought declaratory and other equitable relief, as well as attorneys' fees pursuant to 42 U.S.C. § 1988.

HELD, plaintiff is entitled to a declaratory judgment that the 15-day suspension was unlawful under State law and to have expunged from her school records any reference to the suspension. This relief is appropriate even if the grounds for her suspension were appropriate, and even if she would have been suspended in any event, because the procedures utilized by the LEA were deficient under the State's "Pupil Fair Dismissal Act."

School officials had no obligation to treat the student as a handicapped or special education student when the suspension was imposed, and, therefore, it was unnecessary to provide additional hearing procedures or a formal hearing. State and Federal [§ 1415(b)(1)(C)] hearing procedures are clearly designed to minimize the risk of misclassification and to provide input of the parent and child in the identification or classification decision; thus, schools are under a clear obligation to make the classification decisions through an exclusive formal process. For defendants to have treated the student as handicapped on the basis of an assumption, as plaintiff contended, would have required defendants to ignore and even violate Federal and State law concerning classification or identification.

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P-1 by and through his mother and next friend, M-1; P-2 by and through his mother and next friend, M-2; P-3 by and through his father and next friend, M-3; P-4 by and through his mother and next friend, M-4; P-5 by and through his mother and next friend, M-5; P-6; P-7 by and through his mother and next friend, M-7; P-8 by and through his mother and next friend, M-8; P-9 by and through his mother and next friend, M-9; P-10 by and through his mother and next friend, M-10; P-11 by and through his mother and next friend, M-11,

Plaintiffs

v.

MARK SHEDD, individually and as Commissioner, State Department of Education, FRANCIS MALONEY, individually and as Commissioner, Department of Children and Youth Services,

Defendants

BARBARA BRADEN, individually and in her capacity as Acting Superintendent, Hartford Public Schools, KATE CAMPBELL, FREDERICK BASHOUR, ROBERT BUCKLEY, CURTISS CLEMMENS, JIMMIE BROWN, MARIA SANCHEZ, BARBARA KENNY, M. SUSAN GINSBERG, MYLES HUBBARD, individually and in their official capacities as members of the Hartford Board of Education

Defendants and Third Party Plaintiffs

v.

THE CITY OF HARTFORD, JOHN A. SULIK, City Manager of the City of Hartford, JOHN P. WALSH, Director of Finance of the City of Hartford, GEORGE ATHANSON, Mayor of Hartford, NICHOLAS R. CARBONE, OLGA W. THOMPSON, WILLIAM DIBELLA, RICHARD SUISMAN, MARGARET TEDONE, SYDNEY GARDNER, MILDRED TORRES, ROBERT LUDGIN, and RAYMOND MOTEIRO, members of the Court of Common Council of the City of Hartford,

Third Party Defendants

No. 78-58

D. Connecticut
March 23, 1979
T. EMMET CLARIE, Chief Judge

Action on behalf of six children in the Hartford, CT, School System claimed that State Commissioner of Education, Superintendent, and Members of Hartford Board of Education denied plaintiffs their right to a free and appropriate program of special education in violation of the Education for All Handicapped Children Act, Pub. L. 94-142, and the due process and equal protection clauses of the U.S. Constitution by denying, in some instances, certain procedural protections, failing to provide proper individualized education programs, and delaying placement in appropriate programs for up to two years.

Although number of plaintiffs was increased to 11, class certification was denied; additional defendants, *i.e.*, Mayor, City Manager, Director of Finance and Members of Hartford City Council, and Commission of State Department of Children and Youth Services, were added.

Following pre-trial motions, including denial of defendants' motion to dismiss, and certain changes in the Hartford special education system—addition of new staff for special education, development of certain standard forms, initiation of programs of in-service training of special education personnel, and reforms in identification, evaluation and programming, the parties agreed to the entry of a consent decree, the terms of which satisfy the specific educational needs of the named plaintiffs. Moreover, under the decree, the policies, practices and procedures are to serve to benefit other handicapped children in the Hartford School System, and are to be fully implemented by September 1, 1979. The decree is ordered on the agreement that nothing stated therein shall constitute an admission by the defendants of any unlawful practices, nor an admission by the plaintiffs that the decree fully satisfies defendants' obligations under Pub. L. 94-142, the Rehabilitation Act of 1973, § 504, the due process and equal protection clauses of the U.S. Constitution, or the Connecticut General Statutes.

The provisions of the consent decree concerning specific subject areas will be found at the page indicated under the following index:

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JEAN SHERRY, Individually and as Next Friend of her infant child, DELOWEEN SHERRY,

Plaintiff

v.

NEW YORK STATE EDUCATION DEPARTMENT, New York State School for the Blind, and the Olean City School District

Defendants

No. Civ-79-17

United States District Court
W.D. New York

November 5, 1979

CURTIN, Chief Judge

Counsel for Plaintiff: Monroe County Legal Assistance Corp., Southern Tier Legal Services (Michael L. Hanley, Olean, N.Y., of counsel)

Counsel for State Defendants: Robert D. Stone, Albany, N.Y., New York State Education Department (Seth Rockmuller, Buffalo, N.Y., of counsel)

Counsel for Defendant Olean City School District: Shane & Franz, Olean, N.Y. (J. Michael Shane, Olean, N.Y., of counsel)

Action for injunctive and declaratory relief concerning suspension of handicapped child from State school for the blind, allegedly in violation of Education of the Handicapped Act, 20 U.S.C. §§ 1401 *et seq.*, and § 504 of the Rehabilitation Act of 1973. The multiply-handicapped child was removed from the New York State School for the Blind and hospitalized for treatment of self-inflicted injuries. Three weeks later, the Superintendent of the School, which was run directly by the State, informed the child's mother that the school had insufficient staff to supervise the child and that a return to the residential program would be impossible until her condition changed or more staff was hired. Shortly thereafter, following a multidisciplinary meeting at the local district high school, the Superintendent told the mother that if she insisted on returning the child, the school would suspend her and, if she requested it, provide a suspension hearing. The local school district concluded it had no appropriate program for the child and discontinued day program assistance; the mother requested an impartial due process hearing, pursuant to EHA § 1415, from the State school. Within a week, the school suspended the child, informing the mother that the suspension would be revoked whenever "it appears to be in [the child's] and the school's best interests to do so" and that a hearing would be provided, at which the mother and child had a right to representation by counsel.

HELD, allegation that SEA has not provided the impartial hearing required by § 1415(e)(2) *a fortiori* asserts a claim over which the court has jurisdiction under § 1415. Although existence of meaningful administrative enforcement mechanism might preclude judicial review of private claim under § 504, since such a mechanism is lacking, neither the doctrines of exhaustion of administrative remedies or primary jurisdiction applies. While plaintiff has been reinstated in residential program, claim is not moot because the review procedures complained of are still those utilized; moreover, given plaintiff's condition, there is a significant likelihood that problem could repeat itself and the right to review, if any, would again become an issue.

Although during child's hospitalization and perhaps for a short period of time thereafter, it can reasonably be argued that no change of placement occurred and, therefore, no agency hearing or other safeguards under EHA were required, when, approximately one month later, child was no longer in residential program and temporary program of day assistance had terminated, change in the child's educational placement had occurred within the meaning of § 1415.

State regulations governing "due process hearing" for residents of State operated facility that do not employ an impartial hearing officer or provide for maintenance of placement pending resolution of a complaint are not in compliance with § 1415.

A defense of lack of staff cannot justify a default by State educational agency in the provision of an appropriate education to a qualified handicapped child.

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CHRISTIAN STANLEY, by and through his mother and next friend, LINDA STANLEY,
Plaintiff

v.

School Administrative Unit No. 40 for Milford — Mont Vernon, New Hampshire, *et al.*,
Defendants

No. 80-9-D

United States District Court for the District of New Hampshire

January 15, 1980

O'Connell, District Judge

On motion for declaratory and injunctive relief to prevent LEA from suspending learning disabled, but not emotionally disturbed, child. During first year in high school, child was referred to regional special education consortium, but during that year was suspended six times — once for use of profanity, the balance for failure to come to detention. Prior to the last of these suspensions, the child's parent was notified that the school board would hold a hearing and that parent had a right to have counsel present. The school board suspended the child for 21 days "for neglect or refusal to conform to he reasonable [rules] of" the high school and directed that the child be re-evaluated as soon as practicably possible.

HELD, motion for preliminary injunction denied in most respects. Child is unlikely to succeed in his claim that the suspension constitutes a discrimination on the basis of his handicap. Evidence indicates that child's disruptive behavior was not caused to any substantial degree by his handicap or by his current placement program, but rather by serious family problems. Moreover, although the suspension involved is longer than that considered in *Goss v. Lopez*, 419 U.S. 565 (1975), more elaborate procedural safeguards than are required by *Goss* were afforded and it is unlikely that they will be found procedurally defective. Finally, since the suspension cannot be said to be discriminatory because the child's behavior has not been shown to be substantially related to the child's handicap or the LEA's attempts to remedy that handicap, the unequal treatment that is the hallmark of equal protection analysis under any standard is here not sufficiently evident to predict success on the merits of this claim.

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Kathy STUART, by and through her mother and next friend, Joan Stuart, Plaintiffs,

v.

Pasquale NAPPI, Individually and in his capacity as Superintendent, Danbury Public Schools, Carl Susnitsky, Henrique Antonio, Paul Werner, Paul Baird, Theresa Boccuzzi, Bunny Jacobson, Tonio Pepe, Barbara Baker, Henry Bessel, Robert Jones, Individually and in their capacities as Members of the Danbury Board of Education, Defendants.

Civ. No. B-77-381.

United States District Court, D. Connecticut.

Jan. 4, 1978.

Proceeding was instituted on motion of plaintiff to obtain preliminary relief against

> disclosure. The Contract Compliance Officer will inform the contractor of such a determination. The contractor may appeal that ruling to the Director of OFCC within 10 days. The Director of OFCC shall make a final determination within 10 days of the filing of the appeal. . .

...her expulsion from high school by defendants. The District Court, Daly, J., held that preliminary injunction would issue to enjoin defendants from conducting a hearing to expel plaintiff from high school and to require defendants to conduct an immediate review of plaintiff's special education program where plaintiff made a persuasive showing of possible irreparable injury in that she had deficient academic skills caused by a complex of learning disabilities and limited intelligence and, if expelled, would be without any educational program from date of expulsion until such time as another review was held and an appropriate educational program developed, and plaintiff demonstrated probable success on merits of federal claims that she was denied her rights under the Education of the Handicapped Act to appropriate public education, to remain in her present placement until resolution of her special education complaint, to an education in the least restrictive environment, and to have all changes of placement effectuated in accordance with prescribed procedures.

Preliminary relief ordered.

1. Injunction ⇐136(3), 137(4)

A plaintiff wishing to obtain a preliminary injunction must demonstrate either probable success on the merits of the claim and possible irreparable injury or sufficiently serious questions going to the merits of the claim and a balance of hardships tipping decidedly in his favor.

2. Injunction ⇐136(3), 137(4)

Preliminary injunction would issue to enjoin defendants from conducting a hearing to expel plaintiff from high school and to require defendants to conduct an immediate review of plaintiff's special education program where plaintiff made a persuasive showing of possible irreparable injury in that she had deficient academic skills caused by a complex of learning disabilities and limited intelligence and, if expelled, would be without any educational program from date of expulsion until such time as another review was held and an appropriate educational program developed, and plaintiff demonstrated probable success on merits of federal claims that she was denied her rights under the Education of the Handicapped Act to appropriate public education, to remain in her present placement until resolution of her special education complaint, to an education in the least restrictive environment, and to have all changes of placement effectuated in accordance with prescribed procedures. Education of the Handicapped Act, §§ 602(1), (15-19), 612(5)(B), 615(b)(1)(C, E), (c), (e)(3, 4) as amended 20 U.S.C.A. §§ 1401(1), (15-19), 1412(5)(B), 1415(b)(1)(C, E), (c), (e)(3, 4).

3. Federal Courts ⇐14

Claim that act of defendants in expelling plaintiff from high school was in contravention of Connecticut statutes was based on argument that plaintiff was entitled to a current psychological evaluation and a determination of the adequacy of her special education placement prior to an expulsion hearing and, as such, was exclusively a state claim that was to be ruled upon by a state court in first instance before a district court could exercise its pendent jurisdiction over same. C.G.S.A. §§ 4-177, 4-177(c), 10-233d.

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4. Schools and School Districts ⇐169, 177

Provision of the Education of the Handicapped Act that during pendency of any proceedings child shall remain in current educational placement, unless state or local educational agency and parents or guardian otherwise agree, operates to prohibit disciplinary measures which have effect of changing a child's placement and so prohibits expulsion of handicapped children during pendency of a special education complaint. Education of the Handicapped Act, § 615(b)(1)(E), (e)(3) as amended 20 U.S.C.A. § 1415(b)(1)(E), (e)(3).

5. Schools and School Districts ⇐177

Use of expulsion proceedings as a means of changing a placement of a disruptive handicapped child contravenes provisions of the Education of the Handicapped Act governing procedure whereby disruptive children may be transferred to more restrictive placements when their behavior significantly impairs education of other children. Education of the Handicapped Act, §§ 612(5)(B), 615(b)(1)(C), (e) as amended 20 U.S.C.A. §§ 1412(5)(B), 1415(b)(1)(C), (e).

6. Schools and School Districts ⇐169, 177

Handicapped children are neither immune from a school's disciplinary process nor are they entitled to participate in programs when their behavior impairs education of other children in program; school authorities can take swift disciplinary measures, such as suspension, against disruptive handicapped children, and can request a change in placement of handicapped children who have demonstrated that their present placement is inappropriate by disrupting education of other children. Education of the Handicapped Act, §§ 612(5)(B), 615(b)(1)(C), (e) as amended 20 U.S.C.A. §§ 1412(5)(B), 1415(b)(1)(C), (e).

7. Schools and School Districts ⇐169

Although there is little doubt that judgment of state and local school authorities is entitled to considerable deference, it is equally clear that even a school's disciplinary procedures are subject to scrutiny of federal judiciary in such instances as noncompliance with procedural safeguards of the Education of the Handicapped Act. Education of the Handicapped Act, § 615(e)(4) as amended 20 U.S.C.A. § 1415(e)(4).

8. Federal Courts ⇐332

Provisions of the Education of the Handicapped Act rests jurisdiction in federal district courts over all claims of noncompliance with procedural safeguards of the Act regardless of the amount in controversy. Education of the Handicapped Act, § 615(e)(4) as amended 20 U.S.C.A. § 1415(e)(4).

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S-1, a minor, by and through his mother and next friend, P-1 *et al.*,
Plaintiffs-Appellees

v.

RALPH D. TURLINGTON, individually, and in his official capacity as Commissioner of Education, State of Florida, Department of Education *et al.*,
Defendants-Appellants

No. 79-2742

United States Court of Appeals, Fifth Circuit. Unit B

January 26, 1981

Appeals from the United States District Court for the Southern District of Florida

Before Vance, Hatchett and Anderson, Circuit Judges

Hatchett, Circuit Judge

Appeal from entry of preliminary injunction by District Court for the Southern District of Florida, 3 EHLR 551:211 [1979-80 DEC.], compelling State and local officials to provide educational services and procedural rights provided by EHA to students expelled for misconduct.

HELD, since trial court did not abuse its discretion in entering the preliminary injunction, its decision is affirmed. Before a handicapped student can be expelled, a trained and knowledgeable group of persons must determine whether the student's misconduct bears a relationship to his handicapping condition. An expulsion is a change in educational placement which invokes the procedural protections of EHA and § 504. Expulsion is a proper disciplinary tool under EHA and § 504, but a complete cessation of educational services is not. EHA, 20 U.S.C. § 1415(b), requirement that parents have an opportunity for due process hearing makes no exception for handicapped students who voluntarily withdraw from school or previously agree to an educational placement. State officials were properly included within scope of injunction since, under EHA, 20 U.S.C. § 1412(6), SEA is responsible for ensuring implementation of EHA and expulsion proceedings may deny benefits of EHA to children entitled to education under Act.

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APPENDIX D

COURT CASES: FULL TEXT

JOHN BLUE,

v.

New Haven Board of Education, *et al.*,

No. N 81-41

United States District Court, Connecticut

March 23, 1981

Ellen Bree Burns, District Judge

Motion for preliminary injunction to restrain board of education from conducting any expulsion hearing or taking any other steps to expel student from school, and to direct his reinstatement into special education program or some other suitable program pending a final determination on the merits. Following suspension of child because, *inter alia*, of altercation with teacher, principal recommended that school board expel child. Planning and placement team recommended homebound instruction until expulsion hearing was conducted and continuation of homebound instruction or placement at Trowbridge School if child was expelled. Parent obtained temporary restraining order preventing child's expulsion pending hearing on motion for preliminary injunction.

HELD, plaintiff has made a persuasive showing of irreparable harm and likelihood of success on the merits and is entitled to preliminary injunction. Any attempt by LEA to expel child from school or otherwise change his educational placement during the pendency of his special education complaint would violate 20 U.S.C. § 1415(e)(3). Since the child has already been excluded for more than 10 consecutive days and, under Connecticut law, such an exclusion is tantamount to an expulsion, child is being denied right to remain in his present education placement during the pendency of his special education complaint. Child is entitled to have his educational placement changed by the PPT, and not through the school's normal disciplinary procedures, and to have any PPT placement decision reviewed pursuant to the procedures contained in 20 U.S.C. § 1415(b)-(e). Moreover, homebound instruction pending expulsion and, following expulsion, either continuing that instruction or placement at Trowbridge deprive child of his right to an education in the least restrictive environment.

RULING ON MOTION FOR PRELIMINARY INJUNCTION

Plaintiff John Blue[1] is a sixteen year old student who has been enrolled at Richard C. Lee High School, a public school in New Haven, Connecticut, since January 2, 1980. He is a handicapped child within the meaning of the Education for All Handicapped Children Act of 1975 (hereinafter the Education Act), 20 U.S.C. § 1401, *et seq.*, in that he is seriously emotionally disturbed. 20 U.S.C. § 1401(1). The defendants, the New Haven Board of Education, (hereinafter the Board of Education), as the "local educational agency," 20 U.S.C. § 1401(8), the named members of the Board of Education and the Superintendent of the New Haven Public Schools, are responsible for the provision of special education and discipline within the New Haven Public Schools. Plaintiff has brought this action on behalf of himself and all other handicapped students who are placed in special education programs in the New Haven Public School system and who are subject to the disciplinary procedures employed by the defendants.[2] It is alleged in the complaint that these disciplinary procedures deny handicapped students their rights under the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the United States Constitution, the Education Act, 20 U.S.C. § 1401, *et seq.*, Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, the Civil Rights Act of 1871, 42 U.S.C. § 1983, and Connecticut General Statutes §§ 4-177, *et seq.*, 10-76d, and 10-233a. Jurisdiction is invoked pursuant to 20 U.S.C. § 1415(e)(4), 28 U.S.C. § 1331(a) and 28 U.S.C. § 1343(3) and (4).

Pending before this Court is plaintiff John Blue's motion for a preliminary injunction. Plaintiff is seeking preliminary injunctive relief to restrain the defendants from conducting any expulsion hearing or taking any other steps to expel him from school, and to direct the defendants to reinstate

[1] Plaintiff John Blue and his next friend Joan Blue are proceeding under fictitious names. This Court granted plaintiff's motion for leave to proceed under a fictitious name on February 5, 1981.

[2] On February 27, 1981, plaintiff filed a motion for class certification not presently pending before the court.

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plaintiff into his special education program or to some other suitable special education program chosen by agreement of the parties pending a final determination on the merits. Having carefully reviewed plaintiff's school record, the parties' memoranda of law and the evidence introduced at the preliminary injunction hearing, the Court is persuaded that a preliminary injunction should issue.

I.

Facts

John Blue was initially placed in a special education program for emotionally disturbed children on August 25, 1975 while attending school in Jacksonville, Florida. At that time and until the winter of 1979, plaintiff resided in Florida with his father and stepmother, his mother having died when he was three years old. According to a report of the New Haven Public Schools, Department of Public Personnel Services, Florida records describe plaintiff as a "very moody and tempermental" individual who is "easily irritated and annoyed by others." Although he was mainstreamed into regular ninth grade classes in the 1978-1979 school year, he failed all courses and had to repeat that grade in 1979-1980.

In October 1979, John's father died. Two months later he moved to New Haven, Connecticut to reside with his sister, Joan Blue, and her family. In January, 1980 Mrs. Blue sought to enroll John in the New Haven Public Schools. Because Mrs. Blue informed the Department of Pupil Personnel Services that plaintiff had been enrolled in a "Special Program" in Florida and that she did not want him placed in a normal high school curriculum on a trial basis, the Department agreed to refer John to the school psychologist for testing.

Two weeks later, Ms. Barbara Valentine, a school psychologist, conducted a psychological examination. Her evaluation was based on a review of the plaintiff's records from Florida, his scores on a series of tests, behavioral observations of him, two interviews with him and conferences with Mrs. Blue.

Results of the Wechsler Intelligence Scale for Children Revised indicated that John possessed average intellectual potential with Bright Normal abilities in the performance area. His reading level on the Gray Oral Paragraph Test was 10.4. His spelling level (6.7) and arithmetic level (7.1) as determined by the Wide Range Achievement Test were below average for his age and grade level.

In her report, Ms. Valentine described John as "a pleasant young man who appears to be rather tense and highly anxious." She explained that while "he was very serious and somewhat apprehensive and guarded throughout the sessions[,] he responded appropriately and willing to all questions and tasks presented to him." Because a review of all data available to her suggested some adjustment difficulties and emotional problems, Ms. Valentine recommended that John be programmed into two classes in the Emotionally Disturbed and Learning Disabled Program (ED/LD) with supportive services in the remainder of his regular class subjects.

On January 30, 1980 a Planning and Placement Team (PPT) meeting was convened. Both Mr. and Mrs. Blue were present. As a result of that meeting John was placed at Richard C. Lee High School in two ED/LD classes, one in English and the other in Mathematics, and two regular classes.

Later that school year, John was suspended from school on two occasions for disruptive behavior, including smoking, and insubordination. No PPT meetings were held after either suspension because school authorities did not consider the incidents excessively serious or related to his classes.

In the fall of 1980, plaintiff continued at Lee High School in the tenth grade. He was placed in two ED/LD classes and four regular classes.

On October 14, 1980, Mr. Garman, a Biology teacher at Lee High School, sent a Warning of Failure Notice to John's guardians. The notice indicated that John was in danger of failing Biology, a regular class in which he was mainstreamed, because of his poor academic performance and failure to do his work.

On November 24, 1980, John received his report card for the first marking period. It indicated that he had failed Biology and received poor grades in two of his mainstreamed courses and a low average grade in the other mainstreamed course. He received an average grade in English and a good grade in Mathematics, his ED/LD subjects.

On December 17, 1980 a PPT meeting was convened to review plaintiff's special educational program. Neither John nor his sister or brother-in-law were present at the meeting. Although a letter dated December 7, 1980 was allegedly mailed to Mrs. Blue to inform her of the meeting, Mrs. Blue testified and the PPT meeting notes indicate that the Blues were absent because they had not received notice. A copy of the minutes of the PPT review which included the Individualized Educational Program (IEP)[3] developed for the plaintiff were subsequently mailed them.

The minutes of the December 17, 1980 PPT meeting reveal that the only report reviewed by the PPT members was Ms. Valentine's psychological report. The annual IEP goals set by the PPT were for John to: (1) receive a program consistent with aptitude, (2) develop self-awareness and (3) improve school attendance. It was recommended that plaintiff continue his placement in his two ED/LD classes and continue mainstreaming in his remaining academic classes.

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[3] 20 U.S.C. § 1401(19) defines the term "individualized educational placement" as:

> a written statement for each handicapped child developed in any meeting by a representative of the local educational agency or any intermediate educational unit who shall be qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of handicapped children, the teacher, the parents or guardians of such child, and, whenever appropriate, such child, which statement shall include (A) a statement of the present levels of educational performance of such child, (B) a statement of annual goals, including short-term instructional objectives, (C) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs, (D) the projected date for initiation and anticipated duration of such services, and (E) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved

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including Biology. No reference was made to plaintiff's poor academic performance in his mainstreamed classes.

On December 18, 1980, John was involved in an altercation with his Biology teacher, Mr. Garman, which resulted in his being immediately excluded from school and placed on emergency suspension by William Smith, principal of Lee High School. At the preliminary injunction hearing, no evidence was offered concerning what occurred between plaintiff and his teacher. Immediately after the incident Mr. Smith telephoned Mrs. Blue and made an appointment for her and Mr. Blue to meet with him on December 22, 1980.

On December 18, 1980, the chairperson of the PPT sent Mrs. Blue a notice of a PPT meeting to be held on January 7, 1981. The notice explained that the meeting was being held "due to the recent incident that John was involved in at school."

On December 22, 1980, John and Mr. and Mrs. Blue met with Mr. Smith and other staff members to discuss the specifics of the incident and its implications. Mr. Smith explained the expulsion procedure to the Blues, including the fact that John would be placed on homebound instruction immediately following termination of the suspension period and that he would remain on homebound until the expulsion hearing. He told them that as principal he would be submitting a report to the Board of Education recommending expulsion. Mr. Smith also stated that a PPT meeting would be convened to determine plaintiff's appropriate placement.

On January 6, 1981, the Superintendent of the New Haven Public Schools wrote Mrs. Blue a letter advising her that he planned to recommend that the Board of Education expel John from school for dangerous conduct based on the December 18, 1980 incident.

On January 8, 1981, a PPT meeting was held. Present at the meeting were John, Mr. Blue, Mrs. Blue, Mr. Smith, Barbara Valentine, the Head Guidance Counselor, John's Guidance Counselor, the School Social Worker, the School Nurse and John's ED/LD teacher. The PPT minutes indicate that in reaching its placement recommendation, the members reviewed the referral for PPT screening, a psychological report, a social work report, a health report, the notice sent to Mrs. Blue, teacher reports and guidance counselor reports. At the preliminary injunction hearing only the psychological report of January, 1980 and the notice to Mrs. Blue were offered into evidence. According to the testimony of Mrs. Blue, the PPT-members told them that John would be placed on homebound instruction immediately after the suspension period was over and that he would remain on homebound until the expulsion hearing was conducted. The PPT indicated that, if John were expelled, it would recommend placement for him at Trowbridge School or on homebound instruction for the expulsion period. No other alternative program was discussed. The minutes of the meeting reflect that it was the PPT's conclusion that "Regardless of whether the Board of Education expels John for the 'assault' on the teacher' (sic) incident, the PPT recommends placement in Trowbridge Educational Center for the remainder of this school term as the most appropriate educational program for him." No evidence was offered concerning the educational programs available at Trowbridge Educational Center.

On January 19, 1981, the Blues were informed that John would be placed in the Home Instructional Program. Three days later the homebound instructor met with John and Mrs. Blue at their home. Instruction began the following Monday, January 26, 1981, at the New Haven Public Library and consisted of two hours of tutoring a day, five days a week. Plaintiff is still receiving homebound instruction.

On January 20, 1981, the Board of Education sent a letter to Mrs. Blue to inform her that an expulsion hearing would be conducted on January 28, 1981 in accordance with Sections 4-177, 4-180 and 10-233d of the Connecticut General Statutes. The notice advised Mrs. Blue that John had the right to be represented by counsel at the hearing and that she had the right to present evidence in his favor. It also stated that the Board would proceed with the hearing even if she did not appear, unless she could demonstrate extenuating circumstances at least twenty-four hours in advance.

On January 28, 1981, Mrs. Blue, plaintiff and plaintiff's counsel appeared at the office of the Board of Education for the scheduled expulsion hearing. John Esposito, a member of the Board of Education, told Mrs. Blue that the hearing would have to be re-scheduled, perhaps for the following Wednesday, because the Board did not have adequate counsel available. The following day the Assistant Superintendent of Schools sent Mrs. Blue a letter rescheduling the meeting for Wednesday, February 4, 1981.

On January 29, 1981, the plaintiff and Mrs. Blue, through counsel, made a written request for a Connecticut General Statute § 10-76h hearing and administrative review of the diagnosis and evaluation of John's special education program. The request made specific references to the PPT's recommendation that John be placed at Trowbridge School and to the Board of Education members' attempt to expel him from school during the pendency of this matter. It also indicated that the plaintiff had no objection to entering into mediation in lieu of a formal hearing pursuant to Connecticut General Statutes § 10-76h(b)(1).

On February 3, 1981, this Court granted, absent objection, plaintiff's motion for a temporary restraining order to restrain the defendants from conducting any expulsion hearing or taking any other action to expel the plaintiff from school pending a hearing and determination of plaintiff's motion for a preliminary injunction. On February 13, 1981, this Court granted plaintiff's motion to extend that temporary restraining order until February 22, 1981. A hearing was held on plaintiff's motion for a preliminary injunction on February 19, 1981.

II.
Discussion of Law

In considering plaintiff's motion for a preliminary injunction, this Court is not unmindful that the issuance of a preliminary injunction "is an extraordinary and drastic remedy which would not be routinely granted." *Medical Society of the State of New York v. Toia*, 560 F.2d 535, 538 (2d Cir. 1977). To be entitled to such relief, the party seeking the injunction must therefore demonstrate (a) irreparable harm and (b) either (1) likelihood of success on the merits or (2) sufficiently serious questions going to the merits to make

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them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief." *Jackson Dairy, Inc. v. H.P. Hood and Sons, Inc.*, 596 F.2d 70, 72 (2d Cir. 1979). Although this burden is a difficult one to sustain, in this case plaintiff has made a persuasive showing of irreparable harm and likelihood of success on the merits. Plaintiff is therefore entitled to a preliminary injunction ordering the defendants to refrain from conducting an expulsion hearing or from taking any other actions to expel him from school, and directing the defendants to reinstate him into his presuspension special education placement or some other educational program chosen by agreement of the parties during the pendency of any proceedings conducted pursuant to 20 U.S.C. § 1415.

A. Success on the Merits

The Education Act was enacted in 1970 and amended in 1978 to provide Federal financial assistance to States and local educational agencies for the evaluation and education of handicapped children. 45 C.F.R. § 121a.1 (1979); *Campochiaro v. Califano*, Civil No. H-78-64, slip op. at 4 (D CT May 19, 1978); *Stuart v. Nappi*, 443 F. Supp. 1235, 1237 (D CT 1978). To qualify for Federal funds a State must demonstrate to the Commissioner of the United States Department of Education that it has complied with a number of conditions, including the adoption of a policy that assures all handicapped children an appropriate public education, the development and submission of a detailed State plan pursuant to 20 U.S.C. § 1413(b) and the establishment of the procedural safeguards guaranteed to handicapped children and their guardians in 20 U.S.C. § 1415. 20 U.S.C. § 1412. The State plan must specifically set forth the manner in which the State will comply with the Education Act. 20 U.S.C. § 1413. If the State is found eligible and it is determined that the State plan complies with § 1413(a) and (b), the Commissioner must approve the plan. 20 U.S.C. § 1413(c). A local educational agency which desires to receive payments from the State allocation, must apply to the State educational agency for monies. 20 U.S.C. § 1414. Any State or local educational agency which receives Federal assistance under the Education Act is required to establish and maintain certain specified procedures to assure that handicapped children and their parents or guardians are guaranteed procedural safeguards with respect to the provision of free appropriate public education. 20 U.S.C. § 1415.

In accordance with the requirements of the Education Act, the State of Connecticut submitted a State plan which the Commissioner of the Department of Education approved. Presently, both the State of Connecticut and the New Haven Public Schools are receiving funds pursuant to that plan. As recipients of Federal assistance, the State and the New Haven Public Schools are required to abide by the Education Act and the regulations promulgated thereunder.

Among the numerous rights afforded handicapped children under the Act and the regulations are: (1) the right to remain in one's current placement until the resolution of his special education complaint; (2) the right to have all changes in placement effectuated in accordance with prescribed procedures; (3) the right to an education in the least restrictive environment; and (4) the right to an appropriate public education. *Stuart v. Nappi, supra*, 443 F. Supp. at 1240. Plaintiff argues that the defendants' disciplinary process as applied to the plaintiff violates all four of these rights. Having reviewed the testimony and arguments offered at the preliminary injunction hearing the Court concludes that plaintiff has demonstrated likelihood of success on the merits of claims (1) - (3).[4]

1. The right to remain in one's current placement

Section 1415 sets forth the prescribed minimum procedures with which the State must comply. These include, *inter alia*, an opportunity for the parents or guardians of a handicapped child to examine all relevant records relating to the child's evaluation, educational placement and provision of a free appropriate public education and to obtain an independent educational evaluation of the child; written notice to the parents or guardians prior to initiating or changing or refusing to initiate or change the child's evaluation, placement or free appropriate public education; an opportunity to present complaints regarding the child's evaluation, placement or appropriate education, including an opportunity for an impartial due process hearing before the State or local educational agency at which the guardians shall be accorded substantial rights; an impartial review by the State educational agency if the hearing is conducted by a local agency; and the right of any party who is aggrieved by the findings and decision of a State hearing or State review to bring a civil action in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. § 1415(b) - (e)(2). The State of Connecticut has elected to satisfy these requirements by providing for an initial administrative review by the local or regional board of education responsible for providing such special education followed by an impartial due process hearing at the State level. Conn. Gen. Stats. § 10-76h, as amended by Public Act No. 80-175, effective July 1, 1980. § 1415(e)(3) further provides that:

> During the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child . . .

This subsection has been construed to prohibit school officials from taking disciplinary measures against handicapped children which have the effect of changing their educational

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[4] Although plaintiff argues in his memorandum in support of his motion to dismiss that the defendants' actions in placing him on homebound instruction following the completion of the ten-day suspension period and in attempting to expel him from school through the school's regular disciplinary process also violate the Due Process and Equal Protection Clauses of the United States Constitution and the Connecticut General Statutes, plaintiff did not offer any evidence or argument in support of these claims at the preliminary injunction hearing. Plaintiff has therefore failed to make the requisite showing of probable success on the merits of these claims and, in any event, it is unnecessary to address these claims in light of the Court's view of his Federal statutory claim.

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placement during the pendency of § 1415 proceedings. *Stuart v. Nappi*, *supra*, 443 F. Supp. at 1242.

In *Stuart v. Nappi*, *supra*, the court held that expulsion during the pendency of a special education complaint is a change in placement which violates § 1415(e)(3). In that case, plaintiff, a handicapped child, sought a preliminary injunction to restrain the Danbury (Connecticut) Board of Education from expelling her from Danbury High School through the school's normal disciplinary procedures. At the time, plaintiff had completed a ten-day disciplinary suspension and was scheduled to appear at a disciplinary hearing at which the Danbury Board of Education would be considering the Superintendent of Schools' recommendation that she be expelled for the remainder of the school year. Prior to the date of the scheduled hearing plaintiff's counsel made a written request for a § 10-76(h) hearing and review of plaintiff's special education program. At the preliminary injunction hearing there was no showing that plaintiff's attendance at Danbury High School would endanger herself or others. In support of her motion for a preliminary injunction, plaintiff argued that her expulsion from school prior to the resolution of her special education complaint would result in a change in her then current educational placement in violation of 20 U.S.C. § 1415(e)(3)[5]. The court agreed, stating:

> Plaintiff qualifies for the protection that this subsection provides. She has filed a complaint pursuant to 20 U.S.C. § 1415(b)(1)(E) requesting a hearing and a review of her special education placement. Moreover, there has been no agreement to leave her present special education placement voluntarily. . . The novel issue raised by plaintiff arises from the fact that the right to remain in her present placement directly conflicts with Danbury High Schools's (sic) disciplinary process. If the high school expels plaintiff during the pendency of her special education complaint then her placement will be changed in contravention of 20 U.S.C. § 1415(e)(3).

443 F. Supp. at 1241. To resolve the conflict between § 1415(e)(3) and the disciplinary procedures of schools, the *Stuart* court looked to the Education Act, the regulations implementing the Education Act and the comments interpreting the regulations, particularly the comment and the comment to the comment to 45 C.F.R. § 121a.513 which deals with emergencies[6] and the procedures contained in §§ 121a.552 and 121a.533(a)(3) which the court determined replace expulsion as a means of removing handicapped children from school if they become disruptive.[7] The court then

[5] Plaintiff also argued successfully that expulsion would deprive her of the right to an appropriate education, the right to an education in the least restrictive environment and the right to have all changes in placement effectuated in accordance with prescribed procedures.

[6] 45 C.F.R. § 121a.513 provides in pertinent part:

Child's status during proceedings.

(a) during the pendency of any administrative or judicial proceeding regarding a complaint, unless the public agency and the parents of the child agree otherwise, the child involved in the complaint must remain in his or her present educational placement

The comment to that section further provides that:

> Section 121a.513 does not permit a child's placement to be chaged (sic) during a complaint proceeding, unless the parents and agency agree otherwise. While the placement may not be changed, this does not preclude the agency from using its normal procedures for dealing with children who are endangering themselves or others.

The comment to the comment provides that:

> Commenters suggested a provision be added to allow change of placement for health or safety reasons. One commenter requested that the regulations indicate that suspension not be considered a change in placement. Another commenter wanted more specificity to make it clear that where an initial placement is involved, the child be placed in the regular education program or if the parents agree, in an interim special placement.
>
> *Response*: A comment has been added to make it clear that this section would not preclude a public agency from using its regular procedures for dealing with emergencies.

42 Fed. Reg. 42, 473, 42,512 (1977).

[7] 45 C.F.R. § 121a.552 provides:

§ 121a.552 Placements

Each public agency shall insure that:

(a) Each handicapped child's educational placement: (1) is determined at least annually,

(2) Is based on his or her individualized education program, and

(3) Is as close as possible to the child's home;

(b) The various alternative placements included under § 121a.551 are available to the extent necessary to implement the individualized education program for each handicapped child;

(c) Unless a handicapped child's individualized education program requires some other arrangement, the child is educated in the school which he or she would attend if not handicapped; and

(d) In selecting the least restrictive environment, consideration is given to any potential harmful effect on the child or on the quality of services which he or she needs.

The comment to § 121a.552 provides in relevant part:

> Section 121a.552 includes some of the main factors which must be considered in determining the extent to which a handicapped child can be educated with children who are not handicapped. The overriding rule in this section is that placement decisions must be made on an individual basis. The section also requires each agency to have various alternative placements available in order to insure that each handicapped child receives an education which is appropriate to his or her individual needs.
>
> The analysis of the regulations for Section 504 of the Rehabilitation Act of 1973 (45 C.F.R. Part 84 - Appendix, Paragraph 24) includes several points regarding educational placements of handicapped children which are pertinent to this section:
>
> 1. With respect to determining proper placements, the analysis states: ". . . *it should be stressed that, where a*

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concluded that § 1415(e)(3) prohibits disciplinary measures which have the effect of changing a child's placement, *i.e.*, expulsion, yet permits the type of procedures necessary for dealing with a child who appears to be dangerous, *i.e.*, suspension from school for up to ten consecutive days because such a procedure allows the child to remain in his present placement.[8] *Id.* at 1242-1243. The court therefore decided that plaintiff's expulsion prior to the resolution of the complaint would violate the Education Act.

The instant case is procedurally identical to that presented to the court in *Stuart v. Nappi*. As in that case, plaintiff has completed a ten-day period of suspension and is awaiting a disciplinary hearing to determine whether he should be expelled from school. He has also filed a complaint pursuant to 20 U.S.C. § 1415(b)(1)(E) requesting a hearing and review of the PPT's diagnosis, evaluation and recommendation that he be placed at Trowbridge School and asking that he remain in his current educational placement during the pendency of this matter unless the parties otherwise agree. That placement consists of two ED/LD courses and four mainstreamed courses at Lee High School with supportive services in the mainstreamed classes. No agreement has been reached among the parties regarding a different placement and there has been no showing that plaintiff's attendance at Lee High School would pose a danger to himself or others. Any attempt by the defendants to expel John from school or otherwise change his educational placement during the pendency of his special education complaint would therefore violate § 1415(e)(3). Since the defendants have already excluded the plaintiff from school for more than ten consecutive days and under Connecticut law such an exclusion is tantamount to an expulsion, Conn. Gen. Stats. § 10-233(e), *see* Footnote 8, *infra*, the Court concludes that plaintiff is being denied his right to remain in his present educational placement during the pendency of his special education complaint. *See also Sherry v. New York State Education Department*, 479 F. Supp. 1328, 1337 (WD NY 1979).

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handicapped child is so disruptive in a regular classroom that the education of other students is significantly impaired, the needs of the handicapped child cannot be met in that environment. Therefore, regular placement would not be appropriate to his or her needs . . ."

(Emphasis added).

45 C.F.R. § 121a.533 provides:

Placement procedures.

(a) In interpreting evaluation data and in making placement decisions, each public agency shall:

(1) Draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior,

(2) Insure that information obtained from all of these sources is documented and carefully considered;

(3) Insure that the placement decision is made by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; and

(4) Insure that the placement decision is made in conformity with the least restrictive environment rules in §§ 121a.550-121a.554.

(b) If a determination is made that a child is handicapped and needs special education and related services, an individualized education program must be developed for the child in accordance with §§ 121a.340-121a.349 of Subpart C.

[8] Under Connecticut law the terms "suspension" and "expulsion" are defined as follows:

Section 10-233a. Definitions

(d) "Suspension" means an exclusion from school privileges for no more than ten consecutive school days, provided such exclusion shall not extend beyond the end of the school year in which such suspension was imposed.

(e) "Expulsion" means an exclusion from school privileges for more than ten consecutive school days and shall be deemed to include, but not be limited to, exclusion from the school to which such pupil was assigned at the time such disciplinary action was taken, provided such exclusion shall not extend beyond a period of one hundred eighty consecutive school days. Such period of exclusion may extend to the school year following the school year in which such exclusion was imposed.

2. *The right to have all changes in placement made in accordance with proscribed procedures*

In *Stuart v. Nappi*, *supra*, the court also determined that the use of expulsion procedures, even after the termination of complaint proceedings, as a means of changing the placement of disruptive handicapped children contravenes the procedures established by the Education Act and the regulations promulgated thereunder. 443 F. Supp. at 1243. Under the Act, the responsibility for changing the placement of handicapped children rests with a group of professional persons who are knowledgeable about the child, the meaning of the evaluation data and placement options. 45 C.F.R. § 121a.533(3). In Connecticut that responsibility has been allocated to the PPTs. Conn. Gen. Stats. § 10-76d. Moreover, the parents or guardians of a handicapped child are entitled to participate in and appeal from any placement division. 20 U.S.C. § 1415; 45 C.F.R. § 121a.345; Conn. Gen. Stats. § 10-76h. When a handicapped child's behavior becomes so disruptive as to significantly impair the education of other children, that child may be transferred to a more restrictive environment. *Stuart v. Nappi*, *supra*, 443 F. Supp. at 1243; 45 C.F.R. § 121a.552. However, any such change in placement must be made by a PPT after considering the range of available placements and the child's particular needs. It cannot be made by the use of expulsion procedures. *Stuart v. Nappi*, *supra*, 443 F. Supp. at 1243. Plaintiff is therefore entitled to have his educational placement changed by the PPT, and not through the school's normal disciplinary procedures and to have any PPT placement decision reviewed pursuant to the procedures contained in § 1415(b)-(e).

3. *The right to an education in the least restrictive environment*

One of the major goals of the Education Act is to assure that, to the maximum extent appropriate, handicapped chil-

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dren are educated with nonhandicapped children, and that special classes, separate schooling, or other removals of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 20 U.S.C. §§ 1412(5)(B), 1414(1)(c)(iv). This "right to an education in the least restrictive environment," 45 C.F.R. § 121a.550; *Stuart v. Nappi*, *supra*, 443 F. Supp. at 1242, has been implemented in part by 45 C.F.R. § 121a.551 which requires schools to provide a continuum of alternative placements to meet the special education needs of handicapped children. *Id.* at 1242. Among the alternatives which must be made available to handicapped children are: instruction in regular classes, special classes, special schools, homes, hospitals and other institutions. 45 C.F.R. § 121a.551(b)(1).

Plaintiff claims that the defendants' actions in placing him on homebound instruction pending an expulsion hearing and in either continuing that instruction or placing him at Trowbridge School following expulsion deprive him of his right to an education in the least restrictive environment. This Court agrees. If plaintiff is indeed expelled from school, he may be excluded from a placement that is more appropriate for his academic and social development and less restrictive than the homebound instruction program or placement at Trowbridge School. The homebound instruction program limits plaintiff's academic instruction to ten hours a week and completely isolates him from his peers. Placement at Trowbridge will deny him the opportunity to attend regular or special classes at a regular school and will isolate him from his peers at Lee High School. The Education Act prevents a school from limiting a handicapped child's placement alternatives. Defendants therefore cannot circumvent the Act by referring to their normal disciplinary procedures. *Stuart v. Nappi*, *supra*, 443 F. Supp. at 1242-1243.

II.
Irreparable Harm

Plaintiff has made a persuasive showing (1) that he has suffered and is continuing to suffer possible irreparable injury as a result of the defendants' actions in excluding him from school beyond his ten-day suspension period and by placing him on homebound instruction, and (2) that he will suffer possible irreparable injuries if the defendants are permitted to expel him from Lee High School through the remainder of the school year through the school's normal disciplinary procedures. As discussed above, the defendants' actions in excluding plaintiff from school for more than ten days and in attempting to expel him from school through the normal disciplinary process violate at least three substantial rights guaranteed to him by the Education Act. These include his right to remain in his present educational placement during the pendency of his education complaint, the right to have his placement changed in accordance with prescribed procedures and the right to an education in the least restrictive environment.

Plaintiff's present educational placement as determined by the PPT consists of two ED/LD classes and four regular classes at Lee High School. Defendants have removed plaintiff from that placement for more than the permissible ten-day suspension period and placed him in a program of homebound instruction. That program differs significantly from the program developed for him by the PPT. Instead of participating in special and regular classes at a regular public school, plaintiff is being restricted to ten hours a week of individualized tutoring at an isolated location. Such a program imposes a severe limitation on his academic and social development, *see Stuart v. Nappi*, *supra*, 443 F. Supp. at 1240, and is totally unresponsive to his special education needs.

If defendants are permitted to expel plaintiff from school, he will suffer irreparable injury in that his expulsion will preclude him from taking part in any special education programs or other programs offered at Lee High School. Defendants have indicated that plaintiff, if expelled, will be placed at Trowbridge School or will be continued on homebound instruction. Both placements differ considerably from and are more restrictive than the environment at Lee High School. Moreover, if the PPT is limited to considering placement alternatives in environments other than Lee High School, there is a real possibility that plaintiff may be placed in a program which is more restrictive than necessary to meet his special education needs. This result is incompatible with both his right to be educated with nonhandicapped children to the maximum extent appropriate and the obligation of the school to provide a continuum of alternative placements to meet his special education needs. The irreparable injury which plaintiff may possibly suffer to his education and social development as a result cannot be compensated in damages.

Because plaintiff has indeed shown both likelihood of success on the merits and irreparable harm, his motion for a preliminary injunction ordering the defendants to refrain from conducting an expulsion hearing or taking any other actions to expel him from school, and, directing the defendants to reinstate him into his presuspension special education placement or some other educational program chosen by agreement of the parties during the pendency of any proceedings conducted pursuant to 20 U.S.C. § 1415 is granted.

SO ORDERED.

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JANE DOE, on behalf of her minor son, DENNIS DOE, Individually and on behalf of all other persons similary situated,
Plaintiffs

v.

KENNETH J. KOGER, Individually and in his capacity as Superintendent of the School City of Mishawaka; JOHN SHOTTS, Individually and as Director of Special Education for the School City of Mishawaka; RONALD KRONEWITTER, GEORGE VERNASCO, ELVIRA TRIMBOLI, SAMUEL MERCANTINI and ROSEMARY SPALDING, Individually and in their official capacity as Members of the Board of School Trustees of the School City of Mishawaka; HAROLD H. NEGLEY, in his official capacity as Indiana Superintendent of Public Instruction; and GILBERT BLITON, in his official capacity as Director of Special Education for the State Department of Public Instruction,
Defendants.

Civ. A. No. S 79-14

United States District Court
N.D. Indiana
South Bend Division

November 21, 1979

Supplementary Entry December 3, 1979

Allen Sharp, District Judge

Counsel for Plaintiffs: Kyle M. Payne, Legal Services Program of Northern Indiana, Inc., South Bend, Indiana

Counsel for Defendants: Theodore L. Sendak, Attorney General of Indiana, Ronald J. Semler, Deputy Attorney General, Indianapolis, Indiana, James J. Olson, Mishawaka, Indiana

Action by "mildly mentally handicapped" student and his mother alleging that expulsion from school violated student's rights under Education of the Handicapped Act, 20 U.S.C. §§ 1401 *et seq.*, EHA regulations, and Equal Protection Clause of 14th Amendment. Student was suspended with recommendation for expulsion and was expelled for remainder of school year following expulsion hearing. Student's attorney indicated that expulsion would be appealed and requested Rule S-1 hearing. Rule S-1 is State regulation establishing, among other things, specific procedures to be used in placement of mildly mentally handicapped students and other students needing special education. Shortly thereafter, parties agreed that, pending further legal action, student would be placed in interim educational program, which he was. This action followed.

HELD, students whose handicaps caused them to be disruptive cannot be expelled or indefinitely suspended; the school is allowed only to transfer the student to an appropriate, more restrictive environment. Whether a child's handicap is the cause of the child's propensity to disrupt must be determined through the change of placement procedures required by EHA. To subject handicapped students to the same disciplinary expulsions as other students is not to invidiously discriminate against the handicapped in violation of the Equal Protection Clause of the 14th Amendment.

MEMORANDUM AND ORDER

By his mother, Dennis Doe has brought this action challenging his expulsion from school. (By order of this Court, Dennis Doe and his mother, Jane Doe, have been granted permission to use alternative names.) The defendants are the Board of the School City of Mishawaka, certain officials of the school, and certain officials of the State Department of Public Instruction. The plaintiff complains that he was expelled in violation of the equal protection clause of the Fourteenth Amendment to the Constitution and in violation of the Education of the Handicapped Act (20 U.S.C. §§ 401-1461) (Handicapped Act) and the regulations promulgated under the Handicapped Act (45 C.F.R. Regs. 121a.1-121a.754).

This memorandum and order will dispose of several motions. The plaintiff has moved for certification of a class and for partial summary judgment. The state defendants have moved for dismissal or, in the alternative, for a stay pending the exhaustion of administrative remedies. The local defendants have moved for dismissal or, in the alternative, for summary judgment.

The parties agree on the basic factual background. Until October 18, 1978, Dennis attended the John Young School as a mildly mentally handicapped student. On October 18, 1978, the principal of John Young School suspended Dennis for disciplinary reasons and recommended that Dennis be expelled for the remainder of the school year. Pursuant to procedures provided for all Indiana public school disciplinary expulsions, an expulsion hearing was held on November 22, 1978, findings and recommendations were issued on

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December 1, 1978, and Dennis was formally expelled for the remainder of the school year on December 5, 1978. Within two days of Dennis's formal expulsion, Dennis's attorney contacted the local defendants, informing them that Dennis would appeal the expulsion, and requesting that there be held a Rule S-1 hearing. (Rule S-1 is a detailed promulgation issued by the Commission on General Education of the Indiana State Board of Education. Among other things Rule S-1 establishes certain specific procedures to be used in the placement of mildly mentally handicapped students and other students in need of special education.) On December 18, 1978, it was agreed between the parties that, pending further proceedings, Dennis would be placed in an interim educational program beginning January 3, 1979. On January 3, 1979, Dennis returned to school for the remainder of the school year. This federal court action followed.

Class Certification Issues

The plaintiff has moved this Court for an order certifying a class consisting of "all children attending schools operated by the School City of Mishawaka who are in need of or will in the future be in need of special education within the meaning of the Education of the Handicapped Act." The plaintiff does not contend that a large number of special education students were actually suspended or expelled by the School City of Mishawaka during the 1978-79 school year; rather, he contends that relief should be granted on behalf of all special education students because they all face the possibility of disciplinary suspension or expulsion under the school's present policies. For purposes of ruling on this motion, this Court will consider separately the plaintiff's constitutional and statutory claims.

As to the constitutional claim asserted on behalf of the requested class, it is clear that the claim would have to be promptly dismissed. The requested class would have only a claim for a threatened violation of a constitutional right. This Court has no jurisdiction over a claim for a threatened violation of a constitutional right. Such a claim fails to satisfy the "case or controversy" requirement of Article III of the Constitution. *O'Shea v. Littleton*, 414 U.S. 488, 94 S.Ct. 669, 38 L.Ed.2d 674 (1974), *Boyle v. Landry*, 401 U.S. 77, 91 S.Ct. 758, 27 L.Ed.2d 696 (1971). A class should not be certified if it is clear that the claim of the class is void.

The only class which could possibly assert a constitutional claim would have to consist of all special education children actually suspended or expelled by the School City of Mishawaka. But, the plaintiff does not allege that class to be so numerous that joinder of all members is impractical. A class action may be pursued only if the class is so numerous that joinder of all members is impractical. Federal Rules of Civil Procedure 23(a)(1). As to the claim under the Constitution, the motion for an order certifying a class must be denied for failure to satisfy the numerosity requirement.

As to the claim under the federal statute and regulations, a class action would similarly have to be dismissed. The relief requested on behalf of the class is an order requiring the local and state defendants to change their suspension and expulsion policies. The Handicapped Act might allow such a class action to be brought. However, the Department of Health, Education, and Welfare (HEW) has set up administrative procedures for the enforcement of its regulations (45 C.F.R. Regs. 121a.580-121a.593), and the plaintiff has not sought redress through those administrative procedures. Until available administrative remedies have been exhausted, a claim may not be asserted in court. *Lloyd v. Regional Transportation Authority*, 548 F.2d 1277 (7th Cir. 1977).

It should be noted that HEW apparently has not set up administrative procedures for providing individual students with redress for a school's failure to comply with HEW regulations. It follows that exhaustion of administrative remedies would not be required of a class of plaintiffs seeking compensation for damages actually incurred because of violations of the Handicapped Act or regulations promulgated under that act. But the plaintiff does not allege that class to be so numerous that joinder of all members is impractical. Therefore, like the claim under the Constitution, the claim under the statute and the regulations cannot be certified a class action because the class does not satisfy the numerosity requirement. *See* Federal Rules of Civil Procedure 23(a)(1).

The motion for an order certifying a class must be denied.

Exhaustion Issues

The defendants have argued that the plaintiff should not be allowed to pursue this action because the plaintiff has failed to exhaust administrative remedies available within HEW. The plaintiff is seeking redress for violations of his substantive rights under the Handicapped Act. By bringing this action, the plaintiff has presupposed that the Handicapped Act provides substantive rights to students attending a school receiving funds under that act. The defendants have not challenged the plaintiff's presupposition, and this Court has no reason to doubt that the Handicapped Act does provide students substantive rights under the considerations outlined in *Cort v. Ash*, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975). The defendants have been unable to show this Court any HEW administrative procedures providing individual students with redress for violations of their substantive rights. The HEW administrative procedures available do not provide for the compensation of individual students whose Handicapped Act rights have been violated. Before an action may be brought in court, administrative remedies must be exhausted only if they are available. *Lloyd v. Regional Transportation Authority, supra*. There being no HEW administrative remedies providing for the compensation of individual students whose Handicapped Act rights have been violated, this Court must allow the plaintiff's action without requiring exhaustion of HEW administrative remedies.

The defendants have also argued that the plaintiff should not be allowed to pursue this action because the plaintiff has failed to exhaust administrative remedies available at the local and state levels. The plaintiff is challenging both his expulsion and the procedure by which he was expelled. The local and state administrative remedies available are basically appeals from the plaintiff's expulsion. The local and state administrative remedies available do not provide for a challenge to the procedure by which the plaintiff was expelled. Before an action may be brought in court, administrative remedies must be exhausted only if they are available.

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Lloyd v. Regional Transportation Authority, supra. Since the available local and state administrative remedies were not designed for the claim brought by the plaintiff, the plaintiff acted properly in bringing this action in this Court without exhausting the available local and state administrative remedies.

Statutory Issues

By various sections of the Handicapped Act and the HEW regulations promulgated under that Act, it is made clear that the Handicapped Act was intended to limit a school's right to expel handicapped students. 20 U.S.C. § 1415 sets out the procedure by which schools receiving funds under the Handicapped Act are to change the placement of handicapped students. Neither 20 U.S.C. § 1415 nor any of the HEW regulations interpreting that section (45 C.F.R. Regs. 121a.500-121a.514) provide for the expulsion of handicapped students. 20 U.S.C. § 1412 provides in part:

> In order to qualify for assistance under this subchapter in any fiscal year, a State shall demonstrate to the Commissioner that the following conditions are met:
>
> (1) the State has in effect a policy that assures all handicapped children the right to a free appropriate public education.

In the comments to 45 C.F.R. Reg. 121a.552 (which interprets 20 U.S.C. § 1412), HEW cites as pertinent certain language in the analysis of the regulations for Section 504 of the Rehabilitation Act of 1973:

> With respect to determining proper placements, the analysis states: ". . . it should be stressed that, where a handicapped child is so disruptive in a regular classroom that the education of the other students is significantly impaired, the needs of the handicapped child cannot be met in that environment. Therefore regular placement would not be appropriate to his or her needs . . ."

As HEW interpreted the Handicapped Act, schools were not to expel students whose handicaps caused them to be disruptive; rather, schools were to appropriately place such students. This Court must agree with HEW's interpretation. Congress's intent in adopting the Handicapped Act is clear. A school which accepts Handicapped Act funds is prohibited from expelling students whose handicaps cause them to be disruptive. The school is allowed only to transfer the disruptive student to an appropriate, more restrictive, environment. This Court is not alone in making this ruling. A similar ruling was made in *Stuart v. Nappi*, 443 F. Supp. 1235 (D. Conn. 1978).

The prohibition of the Handicapped Act includes not only formal expulsions, but also informal expulsions like Dennis's indefinite suspension pending formal expulsion. It is the removal of handicapped students from school which the Handicapped Act limits. A disruptive handicapped student may be suspended only if the school is unable to immediately place the student in an appropriate, more restrictive, environment. *See Stuart v. Nappi, supra*, (interpreting 45 C.F.R. Reg. 121a.513). A disruptive handicapped student may be suspended only until the school is able to place the student in the appropriate, more restrictive, environment. *See Stuart v. Nappi, supra*, (interpreting 45 C.F.R. Reg. 121a.513).

But the Handicapped Act does not prohibit all expulsions of disruptive handicapped children. It only prohibits the expulsion of handicapped children who are disruptive because of their handicap. Whether a handicapped child may be expelled because of his disruptive behavior depends on the reason for the disruptive behavior. If the reason is the handicap, the child cannot be expelled. If the reason is not the handicap, the child can be expelled. While 20 U.S.C. § 1415 and its accompanying regulation do not provide for the expulsion of handicapped children, they do not prohibit the expulsion of handicapped children. While 20 U.S.C. § 1412 and its accompanying regulations require schools to guarantee that handicapped students have the right to be educated, they do not require schools to guarantee that handicapped students be educated. It is the purpose of the Handicapped Act and its accompanying regulations to provide handicapped students placement which will guarantee their education despite the students' handicap. It is not the purpose of the Handicapped Act to provide handicapped students placement which will guarantee their education despite the students' will to cause trouble. For an appropriately placed handicapped child, expulsion is just as available as for any other child. Between a handicapped child and any other child, the distinction is that, unlike any other disruptive child, before a disruptive handicapped child can be expelled, it must be determined whether the handicap is the cause of the child's propensity to disrupt.

And this issue must be determined through the change of placement procedures required by the Handicapped Act. Since it is the Handicapped Act which requires the consideration of whether a handicapped child's propensity to disrupt is caused by his handicap, Handicapped Act procedures should be followed. The procedures best suited to protect Handicapped Act rights are the procedures provided by the Handicapped Act. When a handicapped child is involved, expulsion must not be pursued until after it has been determined that the handicapped child has been appropriately placed.

The School City of Mishawaka violated the Handicapped Act when it expelled Dennis without first determining, by Handicapped Act procedures, whether his propensity to disrupt was the result of his inappropriate placement. This does not mean, however, that the plaintiff is entitled to compensation. Whether the plaintiff is entitled to compensation depends on whether the school has caused him to lose any education. Whether the school has caused the plaintiff to lose any education depends on whether he would have been expelled even if the appropriate procedures had been followed. And whether he would have been expelled even if the appropriate procedures had been followed depends on whether his propensity to disrupt was the result of his inappropriate placement. As to whether the plaintiff's propensity to disrupt was the result of his inappropriate placement, the parties apparently disagree. Therefore, as far as the federal statute and regulations are concerned, whether the plaintiff is entitled to any compensation is a question which must await trial.

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Constitutional Issues

The plaintiff complains that his expulsion violated the equal protection clause of the Fourteenth Amendment to the Constitution. Courts use one of two tests for determining whether a given policy violates the equal protection clause. Courts will strictly scrutinize a policy which denies rights to one class of persons while granting those rights to another class of persons if either the rights involved are fundamental rights or the burdened class is a suspect class. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973). All other policies are liberally scrutinized to determine whether they rationally further a legitimate state purpose or interest. *Id*. The plaintiff complains that he has been denied education and that this denial is unjustifiable because he is handicapped. Apparently, the plaintiff believes that the policy of disciplinary expulsions should be subject to strict scrutiny. The purported fundamental right is the right to an education. The purported suspect class is the handicapped.

Education is not a fundamental right. While the United States Supreme Court has not so held (*See San Antonio Independent School District v. Rodriguez, supra*), lower courts have so ruled. *Cary v. Board of Education of Adams-Arapahoe School District 28-J, Aurora, Colorado*, 598 F.2d 535 (10th Cir. 1979), *Guadalupe Organization, Inc. v. Tempe Elementary School District No. 3*, 587 F.2d 1022 (9th Cir. 1978), *Denis J. O'Connell High School v. Virginia High School League*, 581 F.2d 81 (4th Cir. 1978). The Constitution does not require, explicitly or implicitly, that a state educate its residents. The Constitution only requires that if a state make education available to one resident, then it must make education equally available to all residents. *San Antonio Independent School District v. Rodriguez, supra*.

Whether the handicapped are a suspect class need not be decided. Even if the handicapped were a suspect class (which this Court seriously doubts), and the strict scrutiny test applied, the plaintiff would have failed to state an equal protection claim. The plaintiff argues that the handicapped are more in need of education than others, that the handicapped are a suspect class, and that therefore the equal protection clause provides the handicapped with a superior right to education, The plaintiff has not asked this Court to rule that the equal protection clause precludes the expulsion of all students; rather, the plaintiff has asked this Court to rule that the equal protection clause precludes only the expulsion of handicapped students. The plaintiff has not complained that the handicapped are being subjected to invidious discrimination under the guise of disciplinary expulsions; rather, the plaintiff has complained that the handicapped are being subjected to the same disciplinary expulsions as all other students. It is not the purpose of the equal protection clause to guarantee that members of a suspect class be given superior rights under a given policy; rather, it is the purpose of the equal protection clause to guarantee that members of a suspect class be given equal rights under a given policy. The equal protection clause does not require a state to guarantee more education to students with a greater need of an education; rather, the equal protection clause requires a state to guarantee an equal educational opportunity to all students. *Id*. To subject the handicapped to the same disciplinary expulsions as other students is not to invidiously discriminate against the handicapped.

It cannot be contested that disciplinary expulsions are rational. Having undertaken to educate its residents, a state has a duty to provide all students with an equal education opportunity. *Id*. A disruptive student interferes with the education of other students in his school. It is quite rational for a school to reserve the option of expelling any student who is interfering with the education of other students. At least with regard to the handicapped, whatever dangers of invidious dicrimination are presented by a policy of disciplinary expulsion, those dangers are outweighed by the rationality of disciplinary expulsions.

Conclusion

The plaintiff's motion for an order certifying a class is denied. The defendants' various alternative motions to dismiss, for summary judgment, or for a stay are denied. The plaintiff's motion for partial summary judgment is granted in part and denied in part.

The sole issue remaining for trial is whether the plaintiff is entitled to compensation under the Handicapped Act and its accompanying regulations.

Supplemental Entry

As this Court noted in its memorandum and order of November 21, 1979, the Education of the Handicapped Act and its amendments (20 U.S.C. §§ 1401-1461) severely impede the exercise of discretion by institutions which accept federal funds under the Act. A recent District Court decision in the Eastern District of Pennsylvania dramatizes this by ruling that the Act requires recipients to provide a handicapped child a longer school year than that provided non-handicapped children if the child's handicap necessitates a longer school year: *Armstrong v. Kline*, 476 F. Supp. 583 (E.D. Pa. 1979).

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HOWARD S. et al., Plaintiffs,

v.

FRIENDSWOOD INDEPENDENT SCHOOL DISTRICT et al., Defendants.

Civ. A. No. G-78-92.

United States District Court, S. D. Texas, Galveston Division.

June 23, 1978.

Parents of handicapped minor sought injunctive relief to insure that minor received necessary and appropriate treatment and education. On motion for preliminary injunction, the District Court, Cowan, J., held that school district violated its legal obligations under the Rehabilitation Act of 1976 and under the Fifth and Fourteenth Amendments with respect to high school student who had minimal brain damage and emotional problems and failed to provide constitutionally required hearings with respect to student's constructive expulsion mandating issuance of preliminary injunction requiring school district to pay cost of student's private schooling necessitated by his difficulties.

Order accordingly.

1. Schools and School Districts ⇐148

Regulations issued by the Secretary of Health, Education and Welfare under the Rehabilitation Act of 1973, the Education for All Handicapped Children Act of 1975, and the amendments of 1974 are reasonably related to the purposes of the enabling legislation. Rehabilitation Act of 1973, § 504, 29 U.S.C.A. § 794; Education of the Handicapped Act, § 602 as amended 20 U.S.C.A. § 1401.

2. Civil Rights ⇐13.4(1)
Schools and School Districts ⇐115

The Civil Rights Act and the Rehabilitation Act of 1973 afford a private cause of action to handicapped students who are denied necessary and appropriate treatment and education. 42 U.S.C.A. § 1983; Rehabilitation Act of 1973, § 504, 29 U.S.C.A. § 794.

3. Injunction ⇐147

For purposes of preliminary injunction, evidence established that school district violated its legal obligations under the Rehabilitation Act of 1973 and under the Fifth and Fourteenth Amendments with respect to high school student who had minimal brain damage and emotional problems and failed to provide constitutionally required hearings with respect to student's constructive expulsion, mandating issuance of preliminary injunction requiring a school district to pay cost of student's private schooling necessitated by his difficulties. Rehabilitation Act of 1973, § 504, 29 U.S.C.A. § 794; U.S.C.A.Const. Amends. 5, 14.

J. Patrick Wiseman and Reed Martin, Houston, Tex., for plaintiffs.

Richard G. Sedgeley and James S. Kelly, Houston, Tex., for FISD defendants.

Douglas B. Owen, Austin, Tex., for State defendants.

James C. Todd, Austin, Tex., for amicus curiae.

STATEMENT OF REASONS FOR PRELIMINARY INJUNCTION

COWAN, Judge.

Pursuant to the mandate of Rule 65(d), Fed.R.Civ.Proc., this Court states herein its reasons for the preliminary injunction issued on June 21, 1978.

These findings of fact and conclusions of law are made solely for the purpose of determining the plaintiffs' rights to obtain preliminary injunctive relief pursuant to Rule 65, Fed.R.Civ.Proc. These findings of fact and conclusions of law are not findings upon the merits. The merits are reserved for trial at a later date, if necessary.

Douglas S. (hereinafter "Douglas"), the minor plaintiff in this case, is an Anglo-American male born in the State of Califor-

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nia on November 16, 1961. In 1962, he was hospitalized and tested for meningitis. Although his mother was eventually able to furnish him a stable family background, the first three years of his life were unsettled, chaotic and traumatic. Competent medical evidence establishes that these two events created a situation in which Douglas has minimal brain damage, a definite learning disability, and at least temporarily, a severe emotional disturbance. Medical testimony establishes that these events in his early childhood are probably the most significant, although not the most immediate, causes of the difficulties which have precipitated this litigation.

Douglas went through the first five years of his schooling in California, where he was diagnosed as having minimal brain damage, and placed in special education classes.

Douglas' parents moved to Friendswood in 1973, and Douglas was enrolled in the public schools maintained by defendant FISD (Friendswood Independent School District). During his first year of school in FISD, his teachers noted his short attention span, hyperactivity and demands for attention. In May of 1974, while enrolled at the Friendswood Junior High School, he was evaluated for the FISD by competent, independent, outside consultants, who noted that despite his normal intelligence, he had made markedly slow progress in school and that probable organic brain damage as well as anxiety interfered with his ability to concentrate, remember and perceive accurately. The consultants recommended that Douglas ". . . continue in a resource program in which he can receive special help with basic subjects . . ." and that "efforts should be made by the school counselor to establish a warm relationship with Douglas . . ."

During his junior high years, Douglas was placed in a special education program in which he was, for the most part "mainstreamed," i. e., placed in classes with nonhandicapped children, but still nevertheless, given special help by a "resource teacher."

In November of 1974, Mrs. Patricia Burton worked out a program for Douglas involving special help, and this program apparently produced reasonably good results during his junior high years.

In mid-August of 1976, Douglas was enrolled in the Friendswood High School. Although FISD's program with reference to Douglas had been reasonably successful in dealing with his problems during junior high, this success ended abruptly when Douglas entered high school. He immediately began to develop behavior problems, characterized by truancy and wandering in the halls. The Assistant Principal, Mr. Fred Nelson, regarded these difficulties as discipline problems and not special education problems and failed to notify the special education department of Douglas' difficulties in adjusting to high school.

These difficulties in high school were clearly foreseeable. All of the experts who have testified have agreed that a young man with Douglas' handicaps, when confronted with the challenge of adjusting to a high school environment and coping with the strains of puberty, is likely to develop severe difficulties. FISD had coped with Douglas' difficulties fairly well up until August of 1976, but FISD did not cope adequately with Douglas' difficulties from August 1976 until December of that year.

Douglas' difficulties at school were paralleled by difficulties in adjusting at home. In November 1975, he was referred to Dr. Grace Jamison at the John Sealy Hospital in Galveston. Dr. Jamison, a child psychiatrist, began to treat Douglas. In December 1976, just before or during the Christmas holidays, Douglas made a suicide attempt which resulted in his being confined in the Graves Unit at John Sealy Hospital for several weeks.

After Douglas was released from the Graves Unit, Dr. Jamison recommended his placement in the Oakes Unit of the Brown School, a private school in Austin. Both Dr. Jamison and Dr. Boynton from the Brown School have testified credibly that Douglas, at the present time, is not able to return to FISD in a normal classroom setting, but that he is capable of receiving an education, and that if he is allowed to remain in a

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setting like the Brown School another 12 to 24 months, he has a reasonable chance of developing into a reasonably well-adjusted person who can lead a productive life. If removed from the Brown School or some similar facility, his prognosis is, the doctors agree, very poor.

The undersigned has concluded that since August of 1976, when Douglas entered high school, FISD has failed to provide him a free, appropriate public education and that this failure was a contributing and a proximate cause (although certainly not the sole or even the predominant cause) of Douglas' severe emotional difficulties which culminated in his suicide attempt and confinement in the Graves Unit of John Sealy Hospital in December of 1976.

Although it is a harsh conclusion, the undersigned must reluctantly conclude that following the development of Douglas' difficulties in adjusting to high school, FISD engaged in a calculated, deliberate effort to avoid and evade its legal responsibility. FISD's activities in this regard violate its legal obligations under the Rehabilitation Act of 1973 (29 U.S.C. § 794) and the Fifth and Fourteenth Amendments to the Constitution of the United States.

The most important deficiencies, in connection with FISD's conduct occurred during the period from August of 1976 until December 1976 and from January 1977 until July 6, 1977. During that period Douglas had been classified as a minimal brain damaged child who needed and was entitled to receive special education. Despite this, when he developed disciplinary difficulties and was wandering the halls, the special education department was never notified. Dr. Wren, the head of special education, was never told that Douglas was having difficulties; instead, Douglas' difficulties were handled entirely and solely as disciplinary problems. No effort was made to determine whether or not his disciplinary problems were related to his diagnosed handicaps. This pattern continued despite expressions of interest and concern by Howard S. and Judy S. (Douglas' parents) to the school administration.

On January 18, 1977, while Douglas was in the Graves Unit of the John Sealy Hospital in Galveston, FISD, without notice to Douglas or his parents, "officially dropped" Douglas from FISD. This effective and constructive expulsion occurred without notice to the parents, without a hearing of any kind, and is a clear violation of the FISD's obligation under the Constitution of the United States. See *Goss v. Lopez*, 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1974).

On February 15, 1977, Mrs. S. met with FISD's superintendent, the assistant principal of the high school, and the head of special education; informed these officials of Douglas' difficulties; delivered to them a handwritten letter indicating that Douglas was only temporarily out of school; advised that Mrs. S. was seeking a suitable educational program for him in the light of his handicaps; and advised that she wished to participate in a scheduled ARD (Admissions, Review and Dismissal) meeting to determine if a suitable program could be developed for Douglas in FISD.

Three days later, on February 18, 1977, the ARD meeting occurred. Mrs. S. was not given an opportunity to be present. The ARD committee "dismissed" Douglas from the special education program "following the usual procedure of Friendswood ISD regarding students who move . . ." This conduct was a subterfuge. Douglas and his family had not moved. Douglas had been placed in a hospital. The hospital had referred him to a special school because of his handicaps and his severe emotional disturbance. By no stretch of the imagination can it be contended that he had "moved." FISD here clearly violated the duties placed upon it by the Constitution of the United States. See *Goss v. Lopez*, *supra*.

Ultimately in May 1977, Mr. and Mrs. S. obtained counsel and requested an impartial due process hearing. Mr. and Mrs. S. were entitled to this due process hearing under the provisions of both the United States Constitution and the Rehabilitation Act of 1973 (29 U.S.C. § 794). Continuing its previous pattern, however, FISD intentionally

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evaded and avoided its responsibility to provide an impartial due process hearing.

A gathering which can best be described as a meeting occurred on July 6, 1977. This "meeting" cannot accurately be described as a hearing. The meeting was chaired by FISD's retained counsel. The designated decision maker was the school superintendent. There was no formal introduction of evidence, no formal presentation of arguments, no notice of the issues to be decided at the meeting, no impartial due process hearing examiner, no findings of fact or conclusions of law, and no real decision of any kind rendered at or after the meeting.

It is true that in July 1977 the Education for All Handicapped Children Act of 1975 (20 U.S.C. § 1401 et seq.) had not become fully operative, and the regulations pursuant to that statute had not been published; the plan of the State of Texas for compliance with that Act had not been approved; however, FISD was still obligated to comply with the Rehabilitation Act of 1973 (29 U.S.C. § 794) and with the Constitution of the United States.

The Rehabilitation Act of 1973 (Public Law 93-112 codified at 29 U.S.C. § 794) provides in its pertinent parts as follows:

> No otherwise qualified handicapped individual in the United States, as defined in § 706(6) of this title shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

FISD at all material times has received federal financial assistance.

On May 4, 1977, the Secretary of Health, Education and Welfare, had published in 45 C.F.R. § 84.36 the regulations issued pursuant to the Rehabilitation Act of 1973. This regulation states:

> § 84.36 Procedural safeguards.
>
> A recipient that operates a public elementary or secondary education program shall establish and implement, with respect to actions regarding the identification, evaluation, or educational placement of persons who, because of handicap, need or are believed to need special instruction or regulated services, a system of procedural safeguards that includes notice, an opportunity for the parents or guardian of the person to examine relevant records, an impartial hearing with opportunity for participation by the person's parents or guardian and representation by counsel, and a review procedure. Compliance with the procedural safeguards of section 615 of the Education of the Handicapped Act is one means of meeting this requirement.

Section 615 of the Education of the Handicapped Act (Public Law 94-142 codified at 20 U.S.C. § 1415) sets forth detailed provisions concerning procedural safeguards and clearly provides that: " . . . no hearing conducted pursuant to the requirements of this paragraph shall be conducted by an employee of such agency or unit involved in the education or care of the child . . . ."

This meeting of July 6, 1977, did not meet the requirements of the regulations published under the Rehabilitation of the Handicapped Act of 1973 (specifically 42 C.F.R. § 84.36) and was not consistent with the procedures promulgated in § 615 of Public Law 94-142 (codified in 20 U.S.C. § 1415, passed on November 29, 1975). In addition, the meeting (if it is claimed to have been a hearing) was not consistent with the due process clause of the Fourteenth Amendment to the Constitution of the United States. See *Lau v. Nichols*, 414 U.S. 563, 94 S.Ct. 786, 39 L.Ed.2d 1 (1973); *Goss v. Lopez*, 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1974); *Morrisey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972); *Mathews v. Eldridge*, 424 U.S. 319 (see particularly the analysis at 335), 96 S.Ct. 893, 47 L.Ed.2d 18; *Sullivan v. Houston ISD*, 307 F.Supp. 1328, 333 F.Supp. 1149 (1969-71). While factually distinguishable, the analysis of Chief Justice Burger in *Hortonville JSD No. 1 v. Hortonville Education Assn.*, 426 U.S. 482, 96 S.Ct. 2308, 49 L.Ed.2d 1 (1976) supports the conclusion that, even without reference to the recent Congressional enactments, the meeting of

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July 6, 1977 (if argued to be a hearing) did not meet the requirements of substantive and procedural due process.

After they had employed counsel, Mr. and Mrs. S. took virtually all action which could conceivably have been taken to attempt to obtain administrative relief. Numerous letters were written to the Texas Educational Agency (hereinafter "TEA") to no avail. Similar entreaties were made to the Department of Health, Education and Welfare (HEW), which launched or said that it launched an investigation in July 1977. Apparently, from the record here, nothing has been heard further from this investigation in the eleven intervening months.

Arguably, an "appeal" could have been taken from the meeting of July 6, 1977 to the FISD Board of Trustees; however, there was no decision to appeal from. In addition, this Court finds from the pleadings and arguments asserted in this cause that an appeal from the "meeting of July 6, 1977" to the Board of Trustees of FISD would have been a futile gesture. The Board's retained counsel was fully cognizant of and an active participant in the meeting of July 6, 1977. The school superintendent and the director of special education (who was also one of the principal administrators in the school system) participated actively in events after January of 1977. It is clear, and the Court finds, that the Board of Trustees ratified the actions of the school administrators at the time of and after Douglas' constructive expulsion in January of 1977 and the further actions relating to Douglas up to July 6, 1977.

A hearing before the Board of Trustees would not have satisfied the requirements of 29 U.S.C. § 794 and the regulations promulgated pursuant thereto. Specifically, 45 C.F.R. § 84.36 would not have been satisfied, and the procedures promulgated by the Education for All Handicapped Children Act of 1975 (Public Law 94-142 § 615 codified at 20 U.S.C. § 1415) would not have been met.

This Court has concluded that the Board of Trustees of FISD has received extremely poor advice concerning its legal obligations and the possible liability of individual administrators and Trustees for intentional violation of plaintiffs' constitutional rights. In this connection, the attention of the Board of Trustees is respectfully directed to the possibility of personal liability being imposed upon school board members for failure to comply with their legal obligations. See Justice White's language *Wood v. Strickland*, 420 U.S. 308 at 321, 95 S.Ct. 992 at 1000, 43 L.Ed.2d 214, where he stated:

> . . . The official, himself, must be acting sincerely and with a belief that he is doing right, but an act violating a student's constitutional rights can be no more justified by ignorance or disregard of settled, indisputable law on the part of one entrusted with the supervision of students' daily lives, than by the presence of actual malice. . . .

See also *Burnaman v. Bay City Independent School District*, 445 F.Supp. 927 (S.D. Tex.1978).

In July 1977 there *may* have been some justification for lack of information concerning the Trustee's legal obligations. There is no like justification now.

The foregoing constitutes the Court's general findings of fact and conclusions of law applicable to this case. In addition the Court makes the following specific findings of fact and conclusions of law.

1.

Plaintiffs have taken all reasonable and practicable steps to exhaust administrative remedies in this cause.

2.

The procedures employed by FISD in connection with the constructive expulsion of Douglas and the other procedures relating to Douglas from January 1977 until the present date have denied Douglas and his parents substantive and procedural due process in violation of the guarantees of the Fifth and Fourteenth Amendments to the Constitution of the United States.

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3.

Mr. and Mrs. S were caught in a typical governmental "Catch 22" situation. FISD purported to have expelled Douglas because he "moved from the system." Thereafter, FISD refused to give him an impartial due process hearing, and took the position that nothing further could be done with the child until he was re-enrolled in FISD. It was impossible to re-enroll him because he had been placed, because of his severe emotional difficulties, in a school outside the jurisdiction of FISD. This removal of Douglas to the Brown School occurred because of FISD's refusal to comply with its legal obligations and its refusal to attempt to work out an appropriate educational plan to afford Douglas a free, appropriate public education.

4.

At the pertinent times, no adequate mechanisms have existed to afford the plaintiffs a full administrative hearing, or a meaningful administrative remedy. In this connection, see plaintiffs' exhibits 7, 8, 15, 16, 18 and 23 (particularly TEA's letter of November 30, 1977 to Mr. Reed Martin).

5.

The undersigned, in determining whether or not to grant a preliminary injunction, has balanced the interests of the parties. The Court concludes that the consequences of denying relief to Douglas and his parents could be disastrous, and that the denial of relief could destroy Douglas' chances to lead a normal life. On the contrary, the relief granted against FISD merely creates, for FISD, an expense and inconvenience—moreover this expense and inconvenience is an expense and inconvenience which is imposed upon FISD by law and which FISD has a legal obligation to undertake. In addition, the Trustees' failure to meet their legal obligations promptly could well result in substantial personal liability.

6.

Douglas at all material times has been a "handicapped child" as that term is defined in the Education for All Handicapped Children Act of 1975 (Public Law 94-142 codified at 20 U.S.C. § 1401 et seq.) Since December 1976, Douglas has been seriously emotionally disturbed and that serious emotional disturbance is compounded by a specific learning disability.

7.

At all material times Douglas has been a "handicapped" child, as that term is defined in § 4(a) of Public Law 94-142 [20 U.S.C. § 1401(1)] because he has been seriously emotionally disturbed and handicapped by a specific learning disability.

8.

At all material times Douglas has been a child with specific learning disabilities, as that term is used in the Education for All Handicapped Children Act of 1975 (Public Law 94-142 codified at 20 U.S.C. § 1401, et seq.) in that he has suffered from minimal brain dysfunction and probable organic brain damage.

9.

At all material times Douglas has been a "qualified handicapped individual" as that term is used in the Rehabilitation Act of 1973 (Public Law 93-112 codified at 29 U.S.C. § 794) and since August of 1976, he has in fact been excluded from participation in and denied the benefits of, and subjected to discrimination under a program or activity receiving federal financial assistance, i. e., the operation of FISD.

10.

Since August of 1976, FISD has failed to afford Douglas a free, appropriate public education and has thus discriminated against him.

11.

FISD has failed to provide, since August of 1976, an individualized education program for Douglas which meets his unique needs. This failure commenced in August of 1976 and continues to this date.

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12.

At all material times, Douglas has been a "handicapped child" as that term is defined in 45 C.F.R. § 128.5 in that he has since December of 1976, suffered from a severe, emotional disturbance, compounded by a specific learning disability.

13.

For some periods of time since June of 1977, Douglas has suffered from a handicap which made placement in a public or private residential program necessary in order for him to have the benefit of a free, appropriate public education. The Court does not hold that such placement will be necessary in the indefinite future, and this determination (it is hoped) will be made by the administrative process functioning through an impartial due process hearing of the type contemplated by § 615 of Public Law 94-142 (20 U.S.C. § 1415) and the regulations promulgated under the Rehabilitation Act of 1973 (specifically the regulation appearing at 45 C.F.R. § 84.36).

14.

During the period from January 1977 until the present date, the State of Texas has not afforded Douglas and his parents a feasible or practicable administrative remedy because TEA has not established procedures to afford an impartial due process hearing in this type of case, or an appeal or review of the type contemplated by § 615 of the Education for All Handicapped Children Act of 1975 [20 U.S.C. § 1415(c)].

15.

There is no legal impediment in the State of Texas to the establishment of the procedural safeguards mandated by the Education for All Handicapped Children Act of 1975 (Public Law 94-142, codified at 20 U.S.C. § 1415). This is true because although there may be legal requirements which require that binding action of certain types be taken only by the Boards of Trustees of school districts, it is common knowledge that the Board of Trustees of Independent School Districts cannot make independent determinations of every question of every conceivable nature presented for decision. For example, employment decisions in reality, are made by the administrators of the Independent School Districts and ratified by the Boards of Trustees. There is no legal impediment to the establishment of an impartial due process hearing procedure such as that set forth in plaintiffs' exhibit 24 (Administrative Procedure Concerning Special Education approved by the Houston Independent School District Board of Education on October 21, 1977).

16.

[1] The regulations issued by the Secretary of Health, Education and Welfare under the Rehabilitation Act of 1973 (codified at 29 U.S.C. § 794), the Education for All Handicapped Children Act of 1975, and the Amendments of 1974 (codified at 20 U.S.C. § 1401 et seq.) are reasonably related to the purposes of the enabling legislation. See concurring opinion by Mr. Justice Stewart in *Lau v. Nichols*, 414 U.S. 563, at 569, 94 S.Ct. 786, 39 L.Ed.2d 1.

17.

Douglas became seriously emotionally disturbed in December of 1976. This emotional upheaval was the precipitating factor which led to his hospitalization and necessitated his enrollment at the Brown School. This emotional disturbance was the result of multiple factors. Medical evidence established that the predominant cause was probably related to organic brain damage and environmental factors in the first three years of his life. On the other hand, the fact that he was not afforded free, appropriate public education during the period from the time he enrolled in high school until December of 1976, was, this Court finds, a contributing and proximate cause of his emotional difficulties and emotional disturbance.

18.

[2] 42 U.S.C. § 1983 and the Rehabilitation Act of 1973 (29 U.S.C. § 794) do afford the plaintiffs a private cause of action.

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Lau v. Nichols, 414 U.S. 563, 94 S.Ct. 786, 39 L.Ed.2d 1 (1973).

CONCLUSION

[3] On the basis of the findings of fact and conclusions of law set forth above, the Court has concluded that there is a high probability that plaintiffs will succeed in the trial of this case on the merits. The Court has further concluded that the plaintiffs will suffer irreparable injury if not given preliminary injunctive relief. The Court has also balanced the irreparable harm which the plaintiffs will suffer against the inconvenience to the defendants and has determined that the irreparable and grave nature of the harm which will be suffered by the plaintiffs greatly outweighs the inconvenience and expense which will be imposed upon the defendants by preliminary injunctive relief. The Court has also determined that the public interest will be served by the entering of a preliminary injunction for the reason that such preliminary injunction will afford the plaintiffs their statutory and constitutional rights, and will encourage compliance with the law.

Reference to the legislative history reveals that it was the judgment of the Congress that the apparently substantial expense of compliance with the Education for All Handicapped Children Act of 1975 (Public Law 94-142, 20 U.S.C. § 1401) is actually much less than cost of life-long institutionalization. Senate Report 94-168, U.S.Code Cong. & Admin.News 1975, pp. 1425, 1433 says:

> The long range implications of these statistics are that public agencies and taxpayers will spend billions of dollars over the lifetimes of these individuals to maintain such persons as dependents and in a minimally acceptable lifestyle. With proper education services, many would be able to become productive citizens, contributing to society instead of being forced to remain burdens. Others, through such services, would increase their independence, thus reducing their dependence on society.

The Court finds the foregoing language to be directly, squarely applicable to the facts of this case.

For the reasons stated herein, the Court, after hearing argument of counsel on the form of the injunctive relief, has entered a preliminary injunction in compliance with the terms and provisions of Rule 65, Fed.R. Civ.Proc. (see copy attached as Exhibit A).

PRELIMINARY INJUNCTION

On the 18th day of May, 1978, the above-entitled and numbered cause was filed seeking a temporary restraining order. Plaintiffs and their counsel appeared in chambers and the Court, after hearing argument, declined to issue a temporary restraining order, but set a hearing for the purpose of determining whether or not a preliminary injunction should issue. This hearing occurred on various dates, culminating in a hearing on June 21, 1978. All parties were allowed to introduce all evidence tendered, present authorities and present full arguments. In compliance with Rule 65(a)(2), Fed.R.Civ.Proc., the Court has considered a consolidation of the extensive hearing with trial on the merits but has declined to do so because to do so might deny the parties their rights to a trial by jury of contested issues of fact. The Court has stated into the record its detailed findings of fact and conclusions of law supporting the granting of this preliminary relief and incorporates such findings of fact and conclusions of law in this preliminary injunction.

Reasons

In compliance with Rule 65(d), the Court states, in summary form, the following reasons for the issuance of this injunction:

EXHIBIT A

1. Plaintiffs have been denied rights guaranteed to them by the Rehabilitation Act of 1973 (Public Law 93-112 § 504, codified at 29 U.S.C. § 794) in that Douglas S., a qualified handicapped individual, has been excluded from participation in and denied the

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EXHIBIT A—Continued

benefits of a free, appropriate public education in the Friendswood Independent School District (hereinafter FISD), and has been subjected to discrimination under an activity receiving federal financial assistance.

2. Douglas S. has been denied the rights to procedural and substantive due process guaranteed by the Fourteenth Amendment to the Constitution of the United States and has been constructively expelled from FISD without being afforded the procedural and substantive due process required by the Constitution of the United States.

3. Plaintiffs have shown a probability of success on the merits at final trial and that plaintiffs will be irreparably injured if temporary injunctive relief is not granted. The public interest will be served by the granting of a preliminary injunction. The certainty of harm to plaintiffs outweighs the inconvenience and expense to the defendants occasioned by the granting of injunctive relief.

Relief Granted as to FISD

1.

Defendants FISD, Ted L. Thomas, J. L. Birdwell, Riley Ross, Harold Whitaker, Bill N. Allen, C. W. Cline, William P. Jones, Dickie K. Warren (hereinafter called "FISD defendants") will forthwith cause an immediate and comprehensive evaluation of Douglas S. and determine his special educational needs. This evaluation may be conducted by a competent, independent, professional evaluator retained by the FISD defendants and need not be done in consultation with the Brown School, but must be done in consultation with Douglas S.'s parents and must be done in such manner as to take advantage of the work of the Brown School and to avoid disturbing Douglas S.'s current placement in the Brown School.

2.

After such consultation and evaluation, the FISD defendants will immediately develop an individual educational plan which specifies Douglas S.'s needs and all services required to meet those needs.

3.

The FISD defendants will thereafter provide directly or arrange to contract for provision of, appropriate educational services for plaintiff Douglas S. without cost, affording contact with non-handicapped children in a normal setting to the maximum extent appropriate.

4.

Douglas S. will remain in the Brown School until such new placement is available, and the FISD defendants must pay the cost of the Brown School on behalf of Douglas S. from January 18, 1977, the date of his constructive expulsion without due process, until Douglas S. is afforded a new placement or until appropriate administrative bodies have afforded Douglas S. and his parents the impartial due process hearing and review of such impartial due process hearing required by 29 U.S.C. § 794 and described in detail in 20 U.S.C. § 1416.

5.

The FISD defendants shall, while the foregoing steps are in progress, create an impartial due process hearing system so that future complaints about or concerning plaintiff Douglas S.'s educational placement may be processed administratively. The FISD defendants shall, in creating and administering this system, comply with the requirements of 20 U.S.C. § 1415 and the applicable regulations published pursuant to the Rehabilitation Act of 1973 and the Education for All Handicapped Children Act of 1975.

6.

The FISD defendants will take all action necessary and appropriate to insure that Douglas S. will not be denied treatment and education in his present educational placement (i. e., the Brown School) until full due process has been afforded Douglas S. and his parents, including payment of the

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EXHIBIT A—Continued

Brown School charges during the period from January 18, 1977 until the date when due process is fully afforded to Douglas S. and his parents. The FISD defendants' obligation to pay the costs and charges of the Brown School with reference to Douglas S. shall continue until terminated by written agreement of the parties or further order of this Court.

Relief Granted as to "State Defendants"

Defendants M. L. Brockette, L. Harlan Ford, Don L. Partridge, and Joe Kelly Butler (hereinafter called "State Defendants") shall, during the period when the FISD defendants are complying with the injunctive relief granted above, insure that the State Defendants are prepared to afford a review of a decision made with reference to Douglas S. by the FISD defendants and in doing so, shall comply with the procedures required by 20 U.S.C. § 1415(c) and all regulations issued applicable thereto.

Security

In compliance with Rule 65(c), the Court will require Howard S. and Judy S. to post a security bond in the amount of $500 for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. In this connection, the Court acknowledges that such security is a mere token and required solely to comply with Rule 65(c), but the Court also acknowledges that the acquisition of a bond of the type which would be required to fully protect the FISD defendants from any loss resulting from this injunction would be virtually impossible and could probably be obtained only by posting cash or negotiable securities equal to the amount of money which the FISD defendants will be required to expend in compliance with this preliminary injunction. The requirement of an excessive or greater bond would in effect deny Howard S. and Douglas S. the statutory and constitutional rights which this Court is attempting here to protect.

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MATTIE T., *et al.*,
Plaintiffs

v.

CHARLES E. HOLLADAY, *et al.*,
Defendants

Civil Action
No. DC-75-31-s

Northern District of Mississippi
Delta Division
ORMA R. SMITH, District Judge

January 26, 1979

Class action was on behalf of all school children in the State of Mississippi who are handicapped or regarded by their schools as handicapped. Plaintiffs asserted that the special education policies and practices of the state and local defendant officials violated their rights under the Education of the Handicapped Act, Section 504 of the Rehabilitation Act of 1973, as amended, Title I of the Elementary and Secondary Education Act of 1965, and the equal protection and due process clauses of the Fourteenth Amendment to the United States Constitution. Summary judgment was granted for the plaintiffs, the court declaring, *inter alia*, that the defendants had violated the plaintiffs' rights under EHA to 1) procedural safeguards; 2) racially and culturally non-discriminatory tests and procedures used to classify them as handicapped and place them in special education programs; 3) educational placement in the least restrictive environment; and 4) a program to locate and identify all handicapped children in the state in need of special education services. Consent agreement developed pursuant to court's order specifies the policies, monitoring procedures and enforcement mechanisms to be implemented by the state defendants to remedy the violations found by the court.

CONSENT DECREE WITH STATE DEFENDANTS

This class action was filed on April 25, 1975 on behalf of all school age children in the State of Mississippi who are handicapped or regarded by their schools as handicapped. The case challenges: (a) the denial of special education services to handicapped children who have been either excluded from school entirely, placed in inappropriate "special education" programs, or neglected in regular education classes, (b) the provision of segregated and isolated "special education" programs, (c) the use of racially and culturally discriminatory procedures in the identification, evaluation and educational placement of handicapped and allegedly handicapped children, and (d) the absence of procedural safeguards to review decisions of school officials regarding the identification, evaluation, and educational placement of these children.

These policies and practices are challenged as violating the rights of plaintiffs and the members of their respective classes under the Education of the Handicapped Act - Part B (EHA-B), 20 U.S.C. §§ 1401, *et seq.*; Title I of the Elementary and Secondary Education Act of 1965 (Title I), 20 U.S.C.
§§ 241a *et seq.*; Section 504 of the Rehabilitation Act of 1973 (Section 504), as amended, 29 U.S.C. § 794; and the equal protection and due process clauses of the Fourteenth Amendment of the United States Constitution.

Defendants are the state officials responsible for administering Mississippi's "special education" and Title I programs for handicapped children and officials from seven local school districts: Rankin County, Pearl Municipal Separate, North Panola, South Panola, Tate County, Kemper County, and Columbus Municipal Separate School Districts. All of the defendants are sued in their official capacities.

Plaintiffs are 26 handicapped or allegedly handicapped children residing in the seven local school districts named above. On September 20, 1977 this case was certified as a class action, with plaintiffs representing in their claims against defendant state officials the class of "all school age children in the State of Mississippi who are handicapped or who are regarded by their schools as handicapped."

On December 13, 1976 plaintiffs filed a motion for summary judgment based on the Federal Education of the Handicapped Act, as amended, against defendant state officials (hereinafter the Department): Charles E. Holladay, Mississippi State Superintendent of Public Education and member of the Mississippi State Board of Education; Heber Ladner and A. F. Summer, members of the Mississippi State Board of Education: Ralph Brewer, Director of the Division of Instruction of the Mississippi State Department of Education; and, by substitution pursuant to Rule 25 (d), Fed. R. Civ. P., Walter H. Moore, Assistant Director of the Division of Instruction, Special Education Section.

On July 28, 1977 the Department's motion to dismiss was denied and plaintiffs' motion for summary judgment was granted. The Court declared, *inter alia*:

> That the above-named defendants have violated the plaintiffs' rights under the Education of the Handicapped Act and the Education of the Handicapped Amendments of 1974, 20 U.S.C. §§ 1401 *et seq.* (Supp. IV, 1974), by denying their right to
>
> a. procedural safeguards, including prior notice and an impartial due process hearing, to challenge decisions regarding their educational evaluation and placement, pursuant to 20 U.S.C. § 1413 (a)(13)(A) (Supp. IV, 1974);
> b. a program to locate and identify all handicapped children in the state in need of special education services, pursuant to 20 U.S.C. § 1413(b)(1)(A) (Supp. IV, 1974);
> c. racially and culturally non-discriminatory tests and procedures

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used to classify them as handicapped and place them in special education programs, pursuant to 20 U.S.C. § 1413(a)(13)(C) (Supp. IV, 1974); and,

d. educational programs which are in normal school settings with non-handicapped children to the maximum extent appropriate, pursuant to 20 U.S.C. § 1413 (a)(13)(B) (Supp. IV, 1974).

Order, July 28, 1977.

In relief the plaintiffs sought the development of a plan by the Department, specifying the policies, monitoring procedures and enforcement mechanisms it would implement to remedy the violations found by the Court. When the Court granted plaintiffs' motion, it ordered the Department to submit to the Court for its approval, following comment by plaintiffs and *amicus curiae* "the Annual Program Plan for Fiscal Year 1978 (1978 Plan), which has been introduced in draft form as defendants' exhibit no. 3, after the document has been finalized and approved by the appropriate federal goyernmental agency in accordance with 20 U.S.C. § 1413." A schedule for comment and final Court action was also mandated.

On July 7, 1978 the Department submitted to the Court its 1978 Plan as finally approved by the federal agency and its then federally-unapproved 1979 Plan, which has now been found "substantially approvable" for first-quarter funding by the federal agency. On August 24, 1978 plaintiffs filed with the Department and the Court extensive comments challenging the adequacy of both the 1978 plan and a second, revised 1979 Plan. On August 9, 1978, *amicus curiae* also filed its objections to the Department's Plans.

Following a period of negotiations, plaintiffs and the Department have agreed to the entry of this consent decree establishing a plan that is in compliance with the Court's Order of July 28, 1977, and which settles all claims against the state defendants except for the claim of attorneys' fees. Agreement to the entry of this decree does not constitute an admission by any party as to any issue of fact or law regarding the adequacy of 1978 and 1979 Plans previously filed with the Court, nor does it constitute a waiver of plaintiffs' claim for attorneys' fees against the Department, nor any defenses the Department may have against this claim.

It is, therefore, ORDERED, ADJUDGED AND DECREED:

1. This Court has jurisdiction over the subject matter of all plaintiffs' claims against the defendant state officials and jurisdiction over the persons of the state defendants with respect to these claims.

2. Pursuant to Rule 23(c)(3) of the Federal Rules of Civil Procedure, the class to which this decree applies is defined as: all children residing within the State of Mississippi who are ages six (6) through twenty (20), inclusive, and who are either handicapped or considered by their schools as handicapped.

3. For the purposes of this decree the following definitions shall apply unless a contrary meaning is indicated in the text:

(a) "child," "children," or "school age children" shall mean a child or children ages six (6) through twenty (20), inclusive;
(b) "days" shall mean calendar days;
(c) "parent" shall mean adult with primary responsibility for the care and protection of a child who is not employed by a Mississippi public agency for that purpose;
(d) "entry of this Decree" shall mean the signing of this Decree by the Court;
(e) "Department" shall mean the defendant state officials named on page 2 of this Decree;
(f) "RST" shall mean Regional Screening Team as defined at pp. 64, *et seq.*, of the Policies and Operating Procedures for the Mississippi Program for Exceptional Children, August 1977;
(g) "IEP" shall mean individualized educational plan as defined by P.L. 94-142;
(h) "Regulation" shall have its normal meaning and indicate a formal written rule or policy adopted by the Department and made known to the public as having the force of law;
(i) "1979 Plan" shall mean the Fiscal Year 1979 Program Plan for Part B of the Education of the Handicapped Act, as amended by P.L. 94-142, submitted by the Department to the Federal Bureau of Education for the Handicapped (BEH) and approved by BEH for first-quarter funding on August 30, 1978;
(j) "SPED" shall mean special education for handicapped children;
(k) "SPED Process" shall mean the entire process by which a child is identified, evaluated, certified as eligible, and placed in a SPED program;
(l) "EMR" shall mean educable mentally retarded;
(m) "TMR" shall mean trainable mentally retarded;
(n) "SLD" shall mean specific learning disabilities.

4. The 1979 Plan and the Department's Regulations are hereby incorporated in this Decree and shall constitute mandatory requirements on the Department as if they were set forth in full in this Decree; except, if any provision in this Decree or in any subsequent Court Decree or Judgment modifies, contradicts, conflicts or is inconsistent in any way with any provision in the 1979 Plan or the Department's Regulations, the Court's Decrees shall be controlling.

5. All new Department Regulations required by this Decree shall be adopted by the Department and have the force of law no later the April 15, 1979; except as to those regulations required by paragraph 15 of this Decree, which have their own separate timetable for adoption.

I. CHILD FIND

6. The Department shall promulgate the following new Regulation:

"In order to insure that all relevant agencies and/or groups within the boundaries of each local school district are aware of the district's child find efforts and of

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the process for referring a child for possible placement in a special education program for handicapped children, the district shall:

"(a) appoint a district employee to direct the child find effort;

"(b) widely publicize within the district the name of that person, his or her functions, and the manner by which he or she may be contacted;

"(c) correspond at least twice a year with agencies or groups within the district which may have knowledge of handicapped children who are not being served, explaining the referral process and requesting that they refer to the district children under the age of twenty-one who may be handicapped. Agencies which must be contacted are: local welfare offices, local health department, local Headstart agencies, and local mental health agency; and

"(d) make at least two personal contacts per year with appropriate personnel from each of the agencies and groups listed in subsection (c) for the purposes described in that subsection.

"These procedures are in addition to the requirements previously specified in DI-SE Bulletin No. 48 and its attachment."

7. The Department shall promulgate the following new Regulation:

"Annually on March 1, beginning March 1, 1980, each local school district shall submit to the Department a written report giving details of child find activities over the preceding twelve months. This report shall include the following:

"(a) A listing of the agencies, individuals, and groups who were contacted and the manner and the number of times they were contacted;

"(b) A copy of the basic information which was provided to the agencies, individuals, and groups (not a copy of each piece of correspondence);

"(c) A copy of any publicity which has been released;

"(d) The number of children, listed separately for each of the following categories, who were:

(i) found (i.e., made known to the district as potentially in need of special education [SPED]);

(ii) found and referred for evaluation specifically as mentally retarded;

(iii) certified by a Regional Screening Team (RST) as eligible for SPED under any handicapping condition;

(iv) placed in SPED following certification;

(v) certified as ineligible by an RST; and

(vi) provided additional evaluation or screening following RST action."

8. The Department shall collect information from each local school district sufficient to determine whether there are children residing in that district who have been certified by an RST as eligible for SPED but who have not been placed by the district in a SPED program. In collecting this information each year, the Department shall inform each district in writing that in completing columns 5, 10, 15, and 19 of Table 4, pp. 57-58 of the 1979 Plan, it is required to use the following definition of "total needing placement":

"Total number of children certified as eligible for SPED by any Regional Screening Team who have not been placed."

9. The Department shall adopt the notices contained in Appendix A to this Decree and issue by March 1, 1979 a new DI-SE-Bulletin informing local school districts that: use of these notices, as modified, is mandatory, receipt of each notice must be certified, and such verification must be recorded by the district in writing.

10. The Department shall:

(a) issue the Parent Information Booklet set forth in Appendix B of this Decree no later than April 15, 1979;

(b) issue by April 15, 1979 a new DI-SE-Bulletin requiring each local school district to:

(i) provide a copy of that Parent Information Booklet immediately to the parents of every child presently in SPED or in the process of evaluation for SPED; and

(ii) explain orally to each child's parents, no later than the district's next review or revision of the child's IEP, the information contained in the Booklet;

(c) promulgate the following new regulation:

"Prior to obtaining a written consent for a child's initial evaluation, each local school district shall provide, in addition to other materials required by state and local policies, a copy of the Department's Parent Information Booklet and an oral explanation of its contents to the parents of each child considered for an evaluation."

11. The Department shall compile the written decisions of SPED hearing officers and make a copy of them available to the public in a form which does not identify the individuals or school districts involved. This copy shall be available for review by the public in the headquarters of the Department's Special Education Section in Jackson, Mississippi. If copies are desired, the person reviewing the decisions may use pay copiers within the headquarters building.

III. LEAST RESTRICTIVE ENVIRONMENT

12. The Department shall initiate by March 1, 1979 and complete by June 1, 1979 an interagency agreement with each Mississippi state agency involved in the education or care of handicapped children, including but not limited to, the Department of Youth Services, Department of Mental Health (Divisions of Mental Retardation and Mental Health), Department of Public Welfare, Education Finance Commission, and those agencies with whom the Department has

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previously entered into an agreement as reflected in the 1979 Plan. Each interagency agreement shall include, at a minimum:

(a) the entire "Interagency Agreement" set forth in the 1979 Plan, Appendix A;

(b) the following specific provisions:

(i) "Each institution administered by _____ [the agency] shall enter into written agreements with the local school district in which the institution is located, and such other districts as may be necessary or appropriate, which commit the school districts to provide appropriate day educational programs for each child referred by the institution and commit the institution to provide program planning and assistance to the districts on request.

(ii) "In addition to the State Department of Education's present requirements, each written individualized educational plan (IEP) prepared for a child residing in an institution administered by _____ [the agency] shall include: the date of initial placement in the institution; the reason for the placement; the specific steps to be taken by the institution to obtain a permanent non-institutional residence and educational program for the child, if appropriate (e.g., specific work done with the child's parents, foster parents, or other community placement as well as with a particular school district); and, as one of the IEP goals, the projected date for this placement.

"Four months prior to the child's release from the institution and placement in a local school district program (or as soon as the decision is made, if the release is to occur in less than four months), the institution shall work closely with the school district to provide a smooth transition. This shall include providing the district with the institution's IEP, educational evaluations, other relevant records, program planning assistance, and such other assistance as is necessary.

"All steps taken and progress toward placement out of the institution shall be recorded in the child's IEP file as they occur.

"Each institution administered by the agency shall also maintain an annual compilation of the length of stay of all residents.";

(c) a detailed written procedure regarding the participation of parents or surrogate parents at all stages of the SPED Process for children who are not living at home. This procedure shall include the following safeguards:

(i) For children who have been placed by a court in the legal custody of a public agency and who are living with foster parents, the foster parents shall serve as surrogate parents.

(ii) For all other children placed by a court in the legal custody of a public agency, the agency shall appoint surrogate parents.

(iii) For children who are living in an institution, group home or other residential facility but who have not been placed by a court in the legal custody of a public agency, the agency responsible for their residential care shall make and document at least three attempts to contact each child's parents (through such methods as letters, telephone calls and home visits) to inform them of the SPED Process, provide a copy of the Department's Parent Information Booklet (set forth in Appendix B of this Decree), and explain their role as advocate for their child. If these efforts fail to involve the child's parents in the SPED Process, or if the parents fail twice to attend IEP meetings set up at a place and time (including weekends) agreed upon by the parents and the agency, the agency shall appoint a surrogate parent for the child unless the child's parents object to the appointment in writing. The agency shall inform the parents in writing that the surrogate has been appointed solely for the purpose of representing the child in the SPED Process, that this has been done because of the importance of securing involvement of non-agency personnel in the SPED Process for institutionalized children, and that the parents retain the right to represent their child at any time they become involved in the SPED Process.

(iv) Surrogate parents shall be drawn from associations of or for handicapped citizens or from other voluntary organizations pursuant to a formal written procedure developed by each agency and set forth in the interagency agreement.

(v) Surrogate parents shall be competent to advocate for the child, have no interest which would conflict with that advocacy, not be an employee of the agency responsible for the residential care or education of the child, get to know the child personally, become familiar with the child's needs, be of the same race as the child, if possible, and vigorously represent the child at each stage of the SPED Process.

(vi) Surrogate parents shall be formally trained to advocate for the child in the SPED Process and the method of training shall be described in the interagency agreement.

(d) a statement that the agency shall cooperate fully with local school districts when called upon by those districts to provide services necessary for implementation of a child's evaluation or IEP;

(e) subject to Education Finance Commission (EFC) approval, in the agreement with the EFC a provi-

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sion insuring that the EFC obtains the Department's concurrence before the EFC approves any request for construction of any structure to be used for any SPED program or service.

13. The Department shall collect information sufficient to determine whether each local school district is placing its handicapped children in the least restrictive environment. This information shall include, at a minimum:

(a) Table 4, set forth at pp. 57-58 of the 1979 Plan, completed by each local school district annually, using the following definitions:
  (i) in column 3—"regular class with resource room services"—resource room services" shall mean those services which supplement, but do not replace, the basic core academic program received by the students in a regular class and shall include such activities as tutoring and special skill development, relating to the academic needs of the student and necessary to assist in regular instructional activities;
  (ii) in column 6—"self contained special classrooms with part-time instruction in a regular class"—"part-time instruction in a regular class" shall mean at least two class periods each day in programs with non-handicapped children in the same age range, one of which must be an academic subject such as mathematics, science, reading, English or social studies, the other may be in such subjects as art, music, physical education or another academic subject;

(These definitions apply only to completion of Table 4 and do not alter any other definitions of resource or self-contained classes currently used by the Department for other purposes.)

(b) each Department Form SEE-37-78 completed by the district;
(c) on-site monitoring visits to the district by personnel of the Department; and
(d) any relevant individual complaints to the Department about the district's program or procedures.

14. The Department shall initiate the procedures set forth in this paragraph whenever it has reason to believe that a local school district is not placing handicapped children in the least restrictive environment. The Department shall have reason to believe this is occurring whenever the Department determines from the information collected pursuant to paragraph 13 of this Decree or from other sources that 1) the number of handicapped children being educated with non-handicapped children is "too low" (as defined in subparagraph (f)), 2) SPED is being provided in a segregated or isolated location within the regular school building, or 3) SPED is being provided in a structure separate from the regular school building.

(a) The Department shall immediately notify the district of its findings in writing and require the district to submit within 14 days a written justification for the practice at issue and documentation, such as copies of individualized educational plans (IEPs), to verify the justification.
(b) The criteria for determining whether a practice is justified for purposes of this paragraph are:
  (i) No special classes, separate schooling, or other removal of handicapped children from the regular educational environment is occurring unless the nature or severity of the children's handicaps is such that education in regular classes with the use of supplementary aids cannot be achieved satisfactorily, and integration with non-handicapped children is occurring as much as appropriate for each child;
  (ii) No child is placed in a setting where he or she cannot participate in activities with non-handicapped age peers unless his or her IEP specifically states that such participation is not appropriate; and
  (iii) No handicapped children are placed in structures separate from the regular school building, unless: 1) no more than fifty (50) percent of all self-contained and fifty (50) percent of all resource classes for handicapped children in the attendance center are housed in such structures, classes serving a comparable number of non-handicapped children are housed in comparable structures, and at least fifty (50) percent of such non-handicapped classes are *not* Title I, ESEA; or, 2) the programs provided in the separate structures are so special that they cannot be provided in the regular school building.
(c) If the district's written justification satisfies the criteria set forth in subparagraph (b), the district's SPED program may be approved for funding by the Department. During the next site visit to the district by the Department, special attention will be paid to those classes provided in structures separate form the regular building to confirm compliance with the criteria set forth in subparagraph (b).
(d) If the justification does not satisfy the criteria set forth in subparagraph (b), the Department shall make a special on-site visit to the district, implement the monitoring process set forth in paragraph 22 of this Decree, and issue a remedial order within 45 days of initially notifying the district pursuant to subparagraph (a). This remedial order shall specify the steps and timetable that must be followed by the district to remedy the problem, including but not limited to, the relocation of the class in an appropriate integrated setting or the

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provision of new resource programs with sufficient services.

(e) The Department shall not approve any portion of the district's SPED program for funding until all the criteria set forth in subparagraph (b) have been met, except:

(i) during the 1979-80 school year any school district listed in Appendix C of this Decree which is not in compliance with the criteria set forth in subparagraph (b) may continue to receive funding if all other aspects of its SPED program are in compliance with this Decree and the Department receives from the district by June 1, 1979 a detailed written plan specifying the steps and timetable by which all the children in the respective schools listed in Appendix C will be integrated into programs in regular school buildings by September 1, 1980; and

(ii) a limited number of districts failing to satisfy by September 1, 1979 the criteria set forth in subparagraph (b)(iii)(1) may continue to receive funding until September 1, 1980 if all other aspects of the district's SPED program are in compliance with this Decree and if the district provides written documentation to the Department demonstrating that it is impossible for it to bring the SPED program into compliance sooner than September 1, 1980. The Department may grant this single one-year extension for no more than ten (10) percent of all SPED classes, programs and services in Mississippi being provided in separate structures on the date of entry of this Decree.

(f) The Department shall consider the proportion of EMR children in a district's resource programs too low if less than 80 percent of the children in EMR programs are being educated part of each day with non-handicapped children, as measured by the sum of columns 4 and 6 on Table 4 (completed pursuant to paragraph 13(a) of this Decree).

IV. PROTECTION IN EVALUATION (NON-DISCRIMINATORY EVALUATION AND PLACEMENT PROCEDURES)

15. The Department shall take the following steps to insure that the identification, referral, evaluation, program development and SPED placement (i.e., the SPED Process) of mentally retarded and learning disabled children in Mississippi is non-discriminatory and in conformance with the terms of this Decree:

(a) Within twenty-one (21) days of the entry of this Decree the Department shall retain at least three consultants, acceptable to the parties, who are expert in the evaluation of the special education needs of handicapped children and in the development of appropriate IEPs and special education programs. The Department shall retain these experts for an amount of time sufficient to allow them to fulfill their responsibilities under subparagraphs (a), (b) and (e) of this paragraph. These experts shall meet with Department personnel and other individuals recommended by the parties to review the Department's policies and procedures and the local and regional personnel skills and practices involved in the SPED Process for mentally retarded and learning disabled children.

(b) No later than 165 days from the entry of this Decree the team of experts shall complete and submit to the parties their written recommendations for modifications in the Department's regulations, policies, procedures, and criteria sufficient to make the SPED Process non-discriminatory and in conformance with this Decree. The basis for this recommendation shall be the currently used SPED Process.

(c) No later than 195 days from the entry of this Decree the Department shall issue proposed regulations, policies, procedures and/or criteria sufficient to implement the experts' recommendations and submit them to plaintiffs for comment and to the Court for approval.

(d) No later than 225 days from the entry of this Decree the Department shall promulgate final regulations, policies, procedures and/or criteria approved by the Court.

(e) No later than 270 days from the entry of this Decree the team of experts, in conjunction with the Department shall complete development of and submit to plaintiffs for comment and to the Court for approval:

(i) a written Comprehensive Personnel Assessment Report, assessing the general personnel skills and training needs of local and regional personnel throughout the State of Mississippi involved in the SPED Process, and

(ii) a written Training Program, specifying in detail the staff, methodology, materials, timelines, program evaluations, and specific skills to be acquired by each participant in a two-year comprehensive statewide program to train sufficient numbers of local and regional personnel to insure that the SPED Process actually being implemented throughout Mississippi is non-discriminatory and in conformance with this Decree.

(f) The Department, with the assistance of such additional staff and consultants as are necessary, shall begin implementation of the Training Program by December 1, 1979 and complete it by December 1, 1981.

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16. By April 15, 1979 the Department shall modify Department Form SE-28-77 to include a new section entitled "Recommendations for Placement" which may be completed by Regional Screening Teams and issue instructions to all Regional Screening Teams and Learning Resource Centers explaining that they may make program placement recommendations when they make eligibility decisions.

17. The Department shall promulgate a new regulation requiring that prior to being certified as handicapped and placed in a SPED program, each child must be physically screened in a manner that conforms with the physical screening requirements set forth in the current Mississippi "Pediatric Screening Program," contained in the Bureau of Family Health Services Procedural Manual.

18. The Department shall promulgate the following new regulation:

> "In the event that a Regional Screening Team (RST) or Learning Resources Center acting as RST rules a child ineligible for certification for a particular handicapping condition, the RST must specify the reason for the ruling, and, where relevant, the additional information that should be gathered about the child. The local school district or other agency referring the child shall inform the child's parents of the RST's eligibility determination and recommendation and, unless the parents withdraw their consent for their child's evaluation, father the additional information specified by the RST. If the district or agency decides to seek a subsequent eligibility determination for the child, the newly gathered information must be resubmitted to the original RST. If the district or agency is still dissatisfied with the eligibility determination, the information may be submitted to the SPED staff of the Department for a final eligibility determination. In no case may a district or agency seek an eligibility determination from more than one RST for a single child.
>
> "The entire evaluation process shall conform to the following timetable:
>
> "(a) Local school district or other agency gathers all information, completes testing, makes Local Survey Committee determination to seek RST certification, and transmits data to RST (hereinafter "initial transmission of data to RST") within 60 days of a child's initial referral for special education. By September 1, 1980 these steps shall be completed within 45 days of a child's initial referral for special education, and by September 1, 1981, within 30 days.
>
> "(b) RST completes first eligibility determination and communicates it to district or agency within 15 days of date of initial transmission of data to RST.
>
> "(c) District or agency informs parents in writing of the RST decision and of the parents' right to withdraw consent for further evaluation of their child if the RST's determination is "ineligible and in need of further information" or if the district or agency disagrees with the RST's ruling, and unless consent is withdrawn, the district or agency gathers any additional information, completes any further testing, and resubmits data to RST within 30 days of date of intitial transmission of data to RST.
>
> "(d) RST completes second eligibility determination and communicates it to district or agency within 45 days of date of initial transmission of data to RST.
>
> "(e) District or agency determines whether to appeal second certification denial to Department and files appeal with Department within 50 days of date of initial transmission of data to RST.
>
> "(f) Department makes final eligibility decision and communicates it in writing to district or agency within 65 days of date of initial transmission of data to RST.
>
> "(g) District or agency informs parents in writing of final Department eligibility decision within 70 days of date of initial transmission of data to RST."

19. The Department shall promulgate the following new regulation:

> "Children placed in a special education program (SPED) may be removed only under the following circumstances:
>
> "(a) the parent initiates a request to remove his/her child from SPED and agrees in writing to the removal after consultation with local school district or agency officials;
>
> "(b the child is withdrawn from school by the parent;
>
> "(c) a due process hearing (or appeal for review by the Department) has resulted in a directive to remove the child from SPED;
>
> "(d) the child has been re-evaluated, and determined to be ineligible for SPED by a Regional Screening Team, and the removal is consistent with the child's written individualized educational program; or
>
> "(e) the child's behavior represents an immediate physical danger to him/herself or others or constitutes a clear emergency within the school such that removal from school is essential. Such removal shall be for no more than 3 days and shall trigger a formal comprehensive review of the child's IEP. If there is disagreement as to the appropriate placement of the child, the child's parents shall be notified in writing of their right to a SPED impartial due process hearing. Serial 3-day removals from SPED are prohibited.

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"(f) in addition to subsections (a)-(e), in the case of a state agency:

(i) there has been a determination, pursuant to the written policy and procedures established by that agency, that the child is no longer handicapped and in need of SPED, or

(ii) the child's admission to the agency's program was pursuant to medical or judicial order and that order has been modified by the physician or court."

20. The Department shall collect and analyze racial data on EMR and SLD educational programs throughout the State of Mississippi and implement a comprehensive program regarding those local school districts or other agencies with racially disparate enrollments. In implementing this provision, the Department shall:

(a) collect data from each district and other agency as to the racial composition of the district's or agency's (i) enrollment as a whole, (ii) EMR enrollment, and (iii) SLD enrollment;

(b) calculate separately the average statewide placement rates for white children in EMR programs and SLD programs (i.e., the total statewide white EMR enrollment divided by the total statewide white public school enrollment and the total statewide white SLD enrollment divided by the total statewide white public school enrollment), expressed as a percent;

(c) calculate separately each district's or agency's placement rates for black children in EMR programs and SLD programs, expressed as a percent;

(d) calculate the difference between each district's or agency's black placement rates and the white statewide placement rates for EMR and SLD, and rank the districts and agencies according to the magnitude of the differences in EMR placement rates. For those districts or agency programs in which there are at least 1000 white students in the total enrollment, the district's or agency's white placement rates may be substituted for the white statewide placement rate in calculating the EMR and SLD placement rate differences;

(e) beginning with those districts or agencies having the largest EMR placement rate differences, provide technical assistance, conduct extensive on-site monitoring of remedial programs, and apply sanctions, if necessary, to ensure that non-discriminatory testing and evaluation procedures are used throughout the State. The Department shall take all steps necessary to bring the EMR placement rate difference to less than 1.9 percent and the SLD placement rate difference to less than 0.25 percent in each district in the State by May 1, 1982. If the Department is not able to achieve these goals by May 1, 1982, there shall be a hearing before this Court at that time at which the burden shall be on the Department to show by a preponderance of the evidence as to each school district in which the goal has not been attained, what steps it has taken to achieve this goal and the specific reasons why the goal has not been reached;

(f) collect annually from each district a written report, specifying separately the student number, race, current placement, and date on which the change in placement occurred for each student formerly in an EMR program and each student formerly in a SLD program. The Department shall review the IEPs of students whose placement was changed when it makes an on-site visit to the district.

V. MONITORING PROCEDURES FOR THE DEPARTMENT

21. The Department shall establish and implement written monitoring and enforcement procedures sufficient to insure that Regional Screening Teams (RSTs) and Learning Resource Centers acting as RSTs are in full compliance with P.L. 94-142 and the terms of this Decree. These procedures shall include at least the following components:

(a) a requirement that each RST complete Department Form DI-SE-F8 and new Form E-25-75, as modified at Appendix D of this Decree;

(b) a requirement that each RST maintain specific records sufficient to document compliance with paragraph 5, pp. 65-66 of the Policies and Operating Procedures for the Mississippi Program for Exceptional Children (August, 1977), as amended by DI-SE-Bulletin #51;

(c) a requirement that specifies for all RSTs a uniform system of record-keeping;

(d) at least one on-site monitoring visit by the Department to each RST each year, which shall include the following actions:

(i) an interview with each member of the RST to determine the specific role played and steps followed by that member in the eligibility determination process. This interview shall include an analysis and justification of his or her involvement in at least three actual eligibility determinations;

(ii) analysis of the RST's completed Form E-25-75, as modified at Appendix D of this Decree, and a significant number of individual children's files to determine:

- the quality and bases for eligibility determinations,
- any disparate treatment by race in the RST's eligibility determination process,
- any irregularities by particular local school districts or other referring agencies;

(iii) a written report of findings, a timetable for compliance, and such follow-up as is

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necessary to insure remedial actions are taken when ordered;

(e) establishment of an effective sanction for non-complying RSTs, including decertification of individual RST members or the RST as a whole.

22. The Department shall establish and implement written monitoring and enforcement procedures sufficient to insure that all local school districts and other state agencies responsible for the education or care of handicapped children are in compliance with P.L. 94-142 and the terms of this Decree. These procedures shall include at least the following components:

(a) the monitoring procedures set forth in the 1979 Plan, *passim*; the 1979 Plan-Appendix E; and the Department's DI-SE-Bulletin #9 and its attachments;

(b) beginning April 15, 1979, extensive interviews by the Department with the parents of at least four unrelated handicapped children during each on-site visit. Parents shall be notified three weeks prior to the visit, using the forms set forth in Appendix E of this Decree. The interviews shall focus on the nature and quality of compliance with each of the requirements of this Decree, including child find, parental notice, evaluation of educational needs, development of IEP, procedural safeguards, delivery of services, and educational progress toward IEP goals;

(c) investigation of the adequacy of surrogate parent procedure and implementation of the other requirements of the interagency agreement, in addition to the components set forth in subparagraphs (a) and (b), when monitoring agencies other than local school districts;

(d) the withholding of P.L. 94-142 and P.L. 89-313 funds from local school districts and other agencies until compliance is achieved. If compliance is not achieved in a timely manner, such other sanctions as are necessary shall be used;

(e) specific timelines for the conduct of and follow-up to the monitoring visits. These timelines shall conform with those set forth in paragraphs 23(b)(ii-iv) of this Decree.

VI. COMPLAINT PROCEDURE

23. The Department shall adopt the following complaint procedures:

(a) In the event the Department receives a complaint of an individual nature charging a local school district or any other agency with non-compliance with any aspect of P.L. 94-142 or this Decree, the Department shall inform the parent that he or she has a right to a P.L. 94-142 hearing and that the request for said hearing must be made to the district superintendent or agency chief.

(b) In the event the Department receives a complaint charging a district, agency, RST, or hearing officer with systemic non-compliance with any aspect of P.L. 94-142 or this Decree, the Department shall implement the following procedure:

(i) Upon receipt of an oral or written complaint, a confidential file shall be opened in the Department's Special Education Section.

(ii) Information as to the exact nature of the complaint shall be gathered from the person making the complaint and placed in the file. Department personnel (the Technical Assistant and/or the Area Contact Person) shall also discuss the complaint with the school district or agency (maintaining the confidentiality of the complainant, unless that confidentiality is waived in writing), write a report of preliminary findings, and send a copy of the report to the district or agency and the complainant within 10 days of the receipt of the complaint.

(iii) If the report required by subparagraph (b)(ii) indicates that the complaint is justified and that the complainant has not been satisfied, a team of Department personnel shall conduct an on-site visit to the district or agency program to investigate the situation further. If the team determines that the district or agency is not in compliance with P.L. 94-142 or the terms of this Decree, a detailed written compliance report, specifying the problem, solutions and timelines, shall be completed and sent to the district or agency and complainant within 30 days of the Department's receipt of the complaint.

(iv) In the event that within 60 days of the Department's receipt of the complaint the district or agency is not implementing the remedial steps within the timetable required by the compliance report, the Department shall inform the district or agency and the complainant in writing that P.L. 94-142 and P.L. 89-313 funds will be withheld from the district or agency until such time as compliance is achieved. The Department shall give the district or agency an opportunity for a hearing prior to withholding funds. The hearing and the withholding, where ordered, shall be completed within 75 days from receipt of the complaint. Such other steps as are necessary to achieve compliance shall also be taken.

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(v) At any time during this process, if the Department believes that the complaint has been resolved and compliance is achieved, it shall inform the complainant of that fact in writing and give the complainant an opportunity to respond before the complaint is considered closed.

(vi) Information about the complaint process set forth in this paragraph shall be disseminated in the Parent Information Booklet required by paragraph 10 of this Decree.

VII. REMEDY FOR CLASS-MEMBERS FORMERLY CLASSIFIED AS MENTALLY RETARDED

24. The Department, in conjunction or by arrangement with each local school district in the State, shall:

(a) identify each person residing in each district in the State who has all of the following characteristics:

(i) was less than 21 years of age on July 28, 1977,

(ii) has been placed in an EMR program at any time since April 25, 1975,

(iii) was not in an EMR, TMR, or SLD program or was not in school at all on December 1, 1978, and

(iv) has not received either a high school diploma or a Department approved SPED diploma or certificate issued while in an EMR, TMR, or SLD program;

(b) determine for each person identified pursuant to subparagraph (a) who is in school but not in a SPED program, whether the person is making satisfactory progress sufficient to obtain a high school diploma prior to his or her twenty-first birthday. "Satisfactory progress" shall mean achieving at least the average annual statewide gain set forth in the most recent report of the Mississippi Educational Assessment Program *and* placement in a grade which would allow the person to obtain a diploma prior to his or her twenty-first birthday with normal annual promotions;

(c) provide each person identified pursuant to subparagraph (a) who is not in school or who is not making "satisfactory progress" in school one of the following programs of education:

(i) if the person is less than 15 years old, a program of tutoring and intensive academic assistance sufficient to bring the person up to a level of academic achievement which should allow the person to receive a high school diploma. The services to be provided in this program and the achievement goals must be set forth in a written education plan developed with the opportunity for parental input;

(ii) if the person is 15 years of age or older, the choice by the person of either:

(A) the program and procedures set forth in subparagraph (c)(i), or

(B) a preparation program for the Graduate Equivalency Diploma and a vocational course of study chosen by the person from available programs;

(d) ensure that all eligible persons (as defined by subparagraphs (a), (b), and (c)) have been notified and given the opportunity to enroll in the education programs required by this paragraph. This shall be accomplished by the following steps:

(i) by May 1, 1979 each eligible person who was in an EMR program at any time since September 1, 1977 shall receive a copy of the notice set forth in Appendix F of this Decree by registered mail, and if there has been no response within ten (10) days, this shall be followed up by telephone notice;

(ii) beginning by May 1, 1979 each local school district shall conduct an extensive publicity and outreach program, in conformance with the procedures set forth at pp. 10-12 of the 1979 Plan and paragraph 6 of this Decree, publicizing widely the notice set forth in Appendix F of this Decree. This publicity and outreach program shall continue until October 15, 1979;

(iii) the education programs required by this paragraph shall begin no later than one week after the opening of the 1979-80 school year. Enrollment shall begin by May 1, 1979 and be kept open at least until October 15, 1979, unless a person can show good cause for enrollment after that date, but before January 1, 1980;

(e) ensure that regardless of the option chosen, each person has the opportunity to receive educational services until the program has been satisfactorily completed or for a period of time equivalent to the difference between the person's age upon removal from the EMR program and the age of twenty-one. These services shall continue beyond the person's twenty-first birthday, if necessary.

VIII. NAMED PLAINTIFFS AND LOCAL SCHOOL DISTRICT DEFENDANTS

25. The Department shall insure that no later than April 1, 1979 each of the named plaintiffs in this action is provided the opportunity for an appropriate educational program, in conformance with either P.L. 94-142 or Paragraph 24 of this Decree.

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26. The Department shall report to plaintiffs by April 1, 1979 on the status of each of the named plaintiffs in this action. This report shall include:

(a) for plaintiffs presently attending school, a description of the specific educational program and related services being provided, the names of the teachers providing such programs or services, the location in which such programs or services are provided, and the extent of participation in programs and activities with non-handicapped children;
(b) for plaintiffs no longer attending school, the last date of school attendance, the reason for leaving school, a description of the last program attended, and any educational programs or services received since leaving school;
(c) any steps taken by the Department since the entry of this Decree to insure the plaintiff is provided an appropriate educational program;
(d) a timetable for any further steps to be taken by the Department.

27. Upon receipt of the report required by paragraph 26 of this Decree and documentation as defined in paragraph 28 of this Decree demonstrating that each named plaintiff residing in North Panola, South Panola, Tate County, Kemper County and Columbus Municipal Separate School Districts has been provided the opportunity for an appropriate educational program, plaintiffs shall file with the Court for its approval a stipulation of a voluntary dismissal, pursuant to Rule 41(a), Fed. R. Civ. P., of all claims against the defendant-officials from that district. Upon receipt of said report and documentation regarding the named plaintiffs residing in Rankin County and Pearl Municipal Separate School Districts, plaintiffs shall file a similar Rule 41(a) stipulation dismissing the claims remaining after summary judgment was granted against defendant-officials in these districts.

28. Documentation required by paragraph 27 to be provided plaintiffs shall consist of the following:

(a) for plaintiffs presently attending school in a SPED program, a copy of the most recent IEP and teacher report;
(b) for plaintiffs presently attending school but not placed in a SPED program, a copy of the most recent teacher report and documentation indicating that the parents, or the plaintiff, if over 18 years of age, have been informed of the plaintiff's right to an appropriate educational program under P.L. 94-142 or paragraph 24 of this Decree and accept or reject the programs offered;
(c) for plaintiffs not attending school, documentation indicating that the parents, or the plaintiff, if over 18 years of age, have been informed of the plaintiff's right to an appropriate educational program under P.L. 94-142 and paragraph 24 of this Decree and accept or reject the programs offered;
(d) for plaintiffs described in subparagraphs (b) and (c) who accept the programs offered, documentation indicating that the IEP meeting or other educational plan meeting with the parents has taken place prior to April 1, 1979.

29. Prior to November 15, 1979 the Department shall conduct on-site monitoring visits, in conformance with paragraph 22 of this Decree, to the North Panola, South Panola, Tate County, Rankin County, Kemper County, Pearl Municipal Separate, and Columbus Municipal Separate School Districts. Plaintiffs shall be given the opportunity to have their representatives accompany the Department on each of these visits and shall be notified of the schedule of visits at least 30 days in advance.

IX. REPORTING, RECORDING AND MONITORING IMPLEMENTATION OF THIS DECREE

30. The Department shall provide plaintiffs a copy of each of the following documents within 10 days of its receipt or issuance by the Department:

(a) all regulations, DI-SE-Bulletins, program instructions, data instructions and forms pertaining in any way to the implementation of this Decree, including but not limited to, those required by paragraphs 6-9, 10(b), 10(c), 13(a), 13(f), 15(d), 16-19, 21, and 22;
(b) Table 4, set forth at pp. 57-58 of the 1979 Plan, as completed annually by each local school district;
(c) the contract entered into with the experts retained pursuant to paragraph 15 of this Decree;
(d) each remedial order issued pursuant to paragraphs 14(d) and 23(b) of this Decree;
(e) the Department's annual or periodic schedule of on-site monitoring visits to local school districts, RSTs, and other state agency programs;
(f) the Department's written notice to local school districts informing them of their obligations under paragraph 24 of this Decree.

31. The Department shall provide plaintiffs with a report on the progress of implementation of this Decree on January 15, 1980, covering the period from the entry of this Decree through December 15, 1979, and then annually on September 1 (beginning September 1, 1980), covering each preceding school year. This report shall include, but not be limited to: [Each paragraph reference below is to a paragraph in this Decree]

(a) the date of each interagency agreement entered pursuant to paragraph 12;
(b) a description of the Department's activities under

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paragraph 14, including:

(i) the names of each local school district receiving a notice pursuant to paragraph 14(a) and the date the notice was sent,

(ii) the names of the districts providing satisfactory justifications pursuant to paragraph 14(c),

(iii) the names of each district visited pursuant to paragraph 14(d) and the dates each visit occurred,

(iv) the name of each school listed in Appendix C which has been found by the Department to satisfy the criteria set forth in paragraph 14(b),

(v) the name of each district allowed to receive funding pursuant to the exemption set forth in paragraph 14(e)(ii) and the number of SPED classes provided in separate structures by each such district,

(c) the name of each local school district, RST, and other State agency program to which the Department has conducted an on-site monitoring visit in conformance with paragraphs 21 and 22, the date of each visit, and the length of time spent and number of Department personnel conducting the visit;

(d) a description of the specific steps taken to implement the Training Program required by paragraph 15(f), including, the number of Department and other personnel conducting the training, the name of each district in which training is currently in progress, the name of each district in which training has been completed, and the number of persons who have completed training;

(e) the EMR, SLD and total enrollment by race for each school district in the State collected pursuant to paragraph 20(a);

(f) the number of "second RST eligibility determinations", as described in paragraph 18(d), listed by suspected handicap and referring school district;

(g) the number of "final Department eligibility decisions", as described in paragraph 18(f), listed by suspected handicap and referring school district (indicate the amount of overlap between subparagraphs (f) and (g), if any);

(h) the number of individual complaints received by the Department, listed by school district involved;

(i) the number of systemic complaints received pursuant to paragraph 23(b), listed by school district and non-compliance issue involved;

(j) data on the Department's remedial program for class-members formerly classified as mentally retarded, listing separately for each school district in the State:

(i) the number of persons meeting all the criteria set forth in paragraph 24(a),

(ii) the number of persons who received the notice required by paragraph 24(d)(i),

(iii) the number of persons satisfying the criteria set forth in paragraph 24(a) who are not: [list separately]

(A) in school,

(B) making "satisfactory progress" in school (as defined in paragraph 24(b),

(iv) the number of persons in subparagraph (1)(iii)(A) of this paragraph who selected the program option described in: [list separately]

(A) paragraph 24(c)(i),

(B) paragraph 24(c)(ii)(A),

(C) paragraph 24(c)(ii)(B);

(v) the number of persons in subparagraph (1)(iii)(B) of this paragraph who selected the program option described in: [list separately]

(A) paragraph 24(c)(i),

(B) paragraph 24(c)(ii)(A),

(C) paragraph 24(c)(ii)(B);

(k) a description of the status of each of the named plaintiffs in this action, including all of the information required by paragraph 26(a) and (b).

32. In its Jackson, Mississippi headquarters, the Department shall maintain and make available to plaintiffs for inspection and copying, upon 5 days notice, each of the documents and files specified in this paragraph. [All paragraph references are to paragraphs of this Decree.]

(a) Each local school district's child find report required by paragraph 7;

(b) Each interagency agreement required by paragraph 12;

(c) All SEE-37-78 and any comparable, subsequent updated forms completed by school districts;

(d) Each local school district justification required by the Department pursuant to paragraph 14(a) and each district plan required by paragraph 14(e)(i) and (ii);

(e) the data on EMR and SLD transfers from each local school district required by paragraph 20(f);

(f) all reports and records resulting from on-site visits to local school districts, programs of other State agencies, and RSTs, made pursuant to paragraphs 21 and 22;

(g) All files regarding complaints of systemic non-compliance pursuant to paragraph 23(b).

33. Either in its Jackson, Mississippi headquarters or at the location of each RST, the Department shall make available to plaintiffs for inspection and copying, upon 5 days notice, all completed forms E-25-75 and DI-SE-F8, and any comparable, subsequent up-dated forms.

34. Annually, the Department shall provide plaintiffs or their representatives the opportunity to accompany it on on-site monitoring visits, as described in paragraphs 21 and 22 of this Decree, to at least four (4) local school districts, two (2) RSTs and three (3) programs of other State agencies. These opportunities to observe on-site visits shall be in addition to those provided plaintiffs pursuant to paragraph 29 of this Decree. Based on the schedule to be provided pursuant to paragraph 30(e), plaintiffs shall choose which on-site visits to observe and give the Department seven days notice of each visit they will join. Plaintiffs shall be given the opportunity to observe all actions taken by the Department during the visit,

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including any parent interviews, and shall have the opportunity to review all district, agency, or RST files relevant to the SPED Process.

35. The parties and their representatives shall continue to be bound by the requirements of the Protective Order signed by the Court on March 5, 1976.

X. NOTICE TO THE CLASS

36. Within ten days of the entry of this Decree, the Department shall give notice of this Decree to the class represented by plaintiffs.

37. The form of the notice required by paragraph 36 shall be agreed upon by the parties to this Decree. The notice shall afford members of the class an opportunity to file objections to this Decree with the Clerk of this Court within fifteen days following the date of the initial publication of the notice. If there are any objections, there shall be a hearing by the Court on this matter at 9:00 a.m. on February 22, 1979 in Oxford, Mississippi. Otherwise, this Decree shall become final without any further action by this Court.

XI. NOTICE TO PARTIES

38. Any notice, report or communication required by this consent decree or made pursuant to this consent decree shall be sent by first class mail, postage prepaid, as follows:

To Plaintiffs:

Daniel Yohalem, Esq.
1520 New Hampshire Ave., N.W.
Washington, D.C. 20036.

To the Defendants:

C. Bradshaw Farber, Esq.
Giles W. Bryant, Esq.
Office of the Attorney General
Post Office Box 220
Jackson, Mississippi 39205

Either party may change the above designated addressee or address by notice to the other party. A copy of the notice shall be filed with the Clerk of this Court.

XII. JURISDICTION

39. The Court retains jurisdiction of this action for purposes of granting further relief or other appropriate orders. Any party to this Decree may, for good cause, petition for modification of the Decree or any portion thereof.

40. One year after the entry of this Decree the Court shall hold a hearing to determine the status of compliance with this Decree and whether any further relief is necessary from the Department.

41. The terms and conditions of this Decree shall be binding upon each of the defendant state officials, their agents, employees and representatives, and upon their successors in office without the necessity for formal substitution.

42. Except for the hearing provided for in paragraph 40 above, if any of the parties have any questions as to the terms or provisions of this decree, or compliance with said terms or provisions, the parties shall first attempt to negotiate in good faith to resolve any such issues between themselves prior to moving the Court to resolve the issues or requesting imposition of sanctions by the Court.

SO ORDERED, this, the 26th day of January, 1979.

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MRS. A. J., on behalf of herself and her daughter, K. J.,
Plaintiff

v.

SPECIAL SCHOOL DISTRICT NO. 1,
Defendant

Civ. No. 4-77-192

United States District Court
D. Minnesota, Fourth Division

October 12, 1979

MacLaughlin, District Judge

Counsel for Plaintiff: William F. Messinger, Minneapolis, MN; James E. Wilkinson, III, Coalition for the Protection of Youth Rights, Central Minnesota Legal Services, Minneapolis, MN

Counsel for Defendant: Frederick E. Finch, Fredrikson, Byron, Colborn, Bisbee & Hansen, P.A., Minneapolis, MN

Action brought pursuant to 42 U.S.C. § 1983 to challenge the lawfulness of procedures utilized by a school district (LEA) in the 15-day suspension of a child for disciplinary reasons. The plaintiffs, a mother and her daughter, alleged that the LEA did not comply with the State's "Pupil Fair Dismissal Act," Minn. St. §§ 127.26 - 127.39, or with Federal and State statutes concerning handicapped students. At the time of her suspension, the student was the subject of an ongoing "formal educational assessment," as defined in State statutes and regulations, but was not being treated as a special education student or handicapped child by the LEA; nor had the ongoing assessment process yet culminated in any identification of the student as a handicapped child or any proposed course of action as to her future educational placement. Plaintiff sought declaratory and other equitable relief, as well as attorneys' fees pursuant to 42 U.S.C. § 1988.

HELD, plaintiff is entitled to a declaratory judgment that the 15-day suspension was unlawful under State law and to have expunged from her school records any reference to the suspension. This relief is appropriate even if the grounds for her suspension were appropriate, and even if she would have been suspended in any event, because the procedures utilized by the LEA were deficient under the State's "Pupil Fair Dismissal Act."

School officials had no obligation to treat the student as a handicapped or special education student when the suspension was imposed, and, therefore, it was unnecessary to provide additional hearing procedures or a formal hearing. State and Federal [§ 1415(b)(1)(C)] hearing procedures are clearly designed to minimize the risk of misclassification and to provide input of the parent and child in the identification or classification decision; thus, schools are under a clear obligation to make the classification decisions through an exclusive formal process. For defendants to have treated the student as handicapped on the basis of an assumption, as plaintiff contended, would have required defendants to ignore and even violate Federal and State law concerning classification or identification.

MEMORANDUM AND ORDER

This is an action brought pursuant to 42 U.S.C. § 1983[1] by Mrs. A. J. on behalf of herself and her daughter K. J.[2] which challenges the lawfulness of the procedures utilized by Special School District No. 1, the Minneapolis Public Schools, in ordering that K. J. be suspended from school for 15 days for disciplinary reasons. The jurisdiction of this Court is predicated on 28 U.S.C. § 1343(3). Plaintiff has also asserted a pendent State law claim which challenges the defendant's compliance with the Pupil Fair Dismissal Act, Minn. St. §§ 127.26 - 127.39. Further, plaintiff alleges that defendant has not complied with Federal or State statutes and

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[1] 42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

[2] Pursuant to an agreement of counsel, Mrs. A. J. and K. J. have proceeded throughout this litigation without using their names, in order to avoid any possible stigma which could result from public disclosure of their identities.

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regulations concerning handicapped students. Plaintiff seeks declaratory and other equitable relief, as well as attorneys' fees pursuant to 42 U.S.C. § 1988. The Court, having considered all of the evidence presented at trial, as well as the stipulation of facts entered into by the parties, hereby makes the following findings of fact and conclusions of law pursuant to Federal Rules of Civil Procedure 52(a).

On May 16, 1977, K.J., at the time an eighth grade student at Anwatin Middle School, a part of defendant's school system, was suspended for a period of 15 school days by assistant principal David King. The present controversy stems from the allegedly unlawful procedures utilized by the Minneapolis school administration in effectuating this suspension. The 15-day suspension resulted from a fight K. J. was involved in with another student on May 16, 1977. After being sent by her art teacher to assistant principal King's office, and after failing to find him in his office, K. J. went to the counseling department area, where she harassed other students and a secretary. Mr. King found K. J. in the counseling area and took her to his office, where he allowed K. J. to explain her version of the facts involving the fight in art class and the incident in the counseling area, as required by *Goss v. Lopez*, 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975). There is no dispute as to whether the requirements of *Goss* were followed here. In this informal conference between K. J. and Mr. King, K. J. offered no explanation of her behavior, and did not deny that the incidents in question had transpired. At the conclusion of their conference, Mr. King informed K. J. that she was suspended from school for 15 days.

On May 17th, Mr. King prepared the required "notice of formal suspension," which was delivered to Mrs. A. J. on the same day along with a document entitled "alternative education program." The "notice of formal suspension" served on Mrs. A. J. included a statement of the facts underlying the suspension, the grounds for the suspension, a description of testimony, and a readmission plan. The readmission plan, which is mandated by Minn. St. § 127.27, subd. 10, provided that "[h]omework to be supplied and request for demissions from school for the remainder of the 1976/77 school year with referral to SERCC for placement at Bryant YES Center school year 1977/78." The term "demission" relates to the removal of a student, either from the school building, the school system, or a school program. SERCC, the "Special Education Referral Coordinating Committee" is a committee of the Minneapolis school system which examines the educational programs or placements of students referred to the committee, and determines whether the student needs special education services. The Bryant YES Center is a Level V special education program which is operated by the Minneapolis Public Schools. *See* 5 MCAR EDU 120B.11. The form served on Mrs. A. J. which was entitled "alternative education program" provided that "[w]hile K. J. is suspended from school the following alternative education will be provided to him/her: [h]omework to be supplied . . ."

Prior to K. J.'s May 16th suspension, her behavior had led to other disciplinary measures being taken against her. On February 25, 1977, K. J. was sent home for a day for disciplinary reasons. On May 2, 1977, approximately two weeks before the 15-day suspension in issue here, K. J. was suspended for a five-day period for fighting with another student. During the 1976-77 school year, K. J. was not receiving special education services. As a result of these behavior problems and K. J.'s academic performance, a conference was held on May 10, 1977, at the Anwatin School with respect to K. J.'s school problems. Assistant principal King, Ms. Janet Anderson (the Anwatin social worker), Mr. Grommesh (a counselor at Anwatin), Mrs. A. J., and Ms. Clark (a companion of Mrs. A. J.) were present at the May 10th meeting. At this meeting, Mrs. A. J. signed a parental consent form which authorized an evaluation of K. J. to determine if she was in need of special education services. On May 20th, Mrs. A. J. signed another parental consent form authorizing a psychological evaluation of K. J. A diagnostic prescriptive specialist for the Minneapolis schools tested K. J.'s academic progress during May of 1977 and a report was submitted by this specialist on June 2, 1977. Also, on May 26, 1977, K. J. was given a psychological evaluation by the school psychologist. The findings of the psychologist were summarized in a report dated June 16, 1977. Thus, at the time K. J. was suspended for 15 days on May 16th, she was the subject of an ongoing "formal educational assessment" as that term is described in Minn. St. § 120.17 and 5 MCAR EDU 120B.12 and EDU 124.[3] As of May 16th, K. J. was not being treated as a special education student or handicapped child by the defendant school system, and the ongoing assessment process had not yet culminated in any identification of K. J. as a handicapped child or any proposed course of action as to K. J.'s future educational placement.

K. J. returned to Anwatin School on June 8, 1977, after being out of school for 15 school days. During the 15-day suspension period, K. J. was given homework from her regular classroom teachers, which was delivered to K. J.'s home by the school social worker. The homework was picked up by the school social worker towards the end of the suspension period, and returned to K. J.'s teachers for grading. No other instructional services were provided to K. J. during the suspension period, and thus homework amounted to the entire "alternative program" designed for K. J. pursuant to Minn. St. § 127.27, subd. 10 and the applicable state regulations and school board policies. Apparently as a result of administrative oversight, the referral to SERCC made by assistant principal King in K. J.'s readmission plan was never consummated, and K. J. remained at Anwatin for the remainder of the 1976-77 school year.[4]

[3] A "formal educational assessment" is defined in the Minnesota regulations as "an individual evaluation, conducted in accordance with recognized professional standards and the provisions of EDU 124, of a person's performance and/or development for the purpose of determining the need for initiation or change in his or her educational program including special education services." 5 MCAR EDU 120B.12.

[4] Despite Mr. King's recommendation that the prospect of special education services be provided to K. J. at the Bryant YES Center, the referral was never accomplished. Indeed, K. J. remained at Anwatin until the fall of 1977, when she was involved in another fight and her placement finally

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Plaintiff's challenges to the May 16th suspension of K. J. involve constitutional, as well as Federal and State law arguments. With respect to the plaintiff's State law claims, she argues that the defendant's interpretation of the Pupil Fair Dismissal Act, Minn. St. §§ 127.26 - 127.39, is erroneous. In this regard, plaintiff challenges the school system's practice, as in this case, of providing homework as the sole "alternative program" to students suspended for more than five days. Furthermore, plaintiff contends that a formal hearing is necessary under the Pupil Fair Dismissal Act in the event a student is suspended for more than five days, and that the school's practice of initially imposing three consecutive five day suspensions, for a total of 15 days, misconstrues Minn. St. § 127.27, subd. 10. Plaintiff also argues that school officials, at the time of her May 16th suspension, perceived K. J. as a handicapped student, and therefore a more formal hearing than the informal administrative conference provided was warranted because of K. J.'s handicapped status. Finally, plaintiff submits that the procedures utilized by the defendant in suspending K. J. for 15 days were so deficient as to deprive her of procedural due process under the Fourteenth Amendment. In this connection, plaintiff points out that the informal hearing mandated by *Goss v. Lopez*, 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975) is applicable only to suspensions of ten days or less, and as the suspension involved here exceeded ten days, more formal hearing procedures should have been implemented.

I.

The Minnesota Pupil Fair Dismissal Act

The Pupil Fair Dismissal Act, Minn. St. §§ 127.26 to 127.39, was enacted in 1974. This act prescribes elaborate formal hearing procedures to be utilized in the event the school administration attempts to expel or exclude[5] a student, but provides only that an "informal administrative conference" transpire before a pupil is suspended. *See* Minn. St. §§ 127.31, 127.30, subd. 1. The "informal administrative conference" required by Minn. St. § 127.30, subd. 1 is designed to function as the equivalent of the "informal give and take between student and disciplinarian" required by *Goss. Goss v. Lopez*, 419 U.S. 565, 584, 95 S.Ct. 729, 741, 42 L.Ed.2d 725 (1975).

changed, with Mrs. A. J.'s consent, to the Bryant YES Center.

[5] Minn. St. § 127.27, subd. 4 and subd. 5 define exclusion and expulsion respectively, as follows:

> Subd. 4. "Exclusion" means an action taken by the school board to prevent enrollment or reenrollment of a pupil for a period that shall not extend beyond the school year.
>
> Subd. 5. "Expulsion" means an action taken by a school board to prohibit an enrolled pupil from further attendance for a period that shall not extend beyond the school year.

As Minn. St. § 127.27, subd. 10 allows consecutive suspensions to be imposed provided that the total time period does not exceed 15 days, by implication, any temporary removal of a student from school which exceeds 15 days in length is by definition an expulsion, which requires the use of the formal hearing procedures embodied in Minn. St. § 127.31.

A. Suspensions for Fifteen School Days

The critical section for purposes of this proceeding is Minn. St. § 127.27, subd. 10, which provides:

> *"Suspension" means an action taken by the school administration, under rules promulgated by the school board, prohibiting a pupil from attending school for a period of no more than five school days.* This definition does not apply to dismissal from school for one school day or less. Each suspension action shall include a readmission plan. The readmission plan shall include, where appropriate, a provision for alternative programs to be implemented upon readmission. Suspension may not be consecutively imposed against the same pupil for the same course of conduct, or incident of misconduct, except where the pupil will create an immediate and substantial danger to persons or property around him. In no event shall suspension exceed 15 school days, provided that an alternative program shall be implemented to the extent that suspension exceeds five days.

[Emphasis supplied.] This provision, or the Act, has not been interpreted by the Minnesota Supreme Court.[6] The problem

[6] The issue of abstention can be raised by the Court *sua sponte*. *Bellotti v. Baird*, 428 U.S. 132, 96 S.Ct. 2857, 49 L.Ed.2d 844 (1976). The Court has determined that abstention would be improper under the circumstances. The equitable doctrine of abstention was initially developed in *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941) wherein the Supreme Court held that it would defer exercising its jurisdiction to decide a case until the State courts determined unresolved issues of State law, the resolution of which might obviate the necessity to decide a Federal constitutional question. *Pullman* was concerned with a State regulation which was challenged as racially discriminatory, but the unresolved State law issue concerned the power or jurisdiction of the State agency to enact such a regulation. Thus, if under State law there was no power to enact the regulation, the Federal constitutional claim became non-existent. *See, e.g., Elkins v. Moreno*, 435 U.S. 647, 98 S.Ct. 1338, 55 L.Ed.2d 614 (1978); *Boehning v. Indiana State Emp. Ass'n, Inc.*, 423 U.S. 6, 96 S.Ct. 168, 46 L.Ed.2d 148 (1975).

In the instant litigation, plaintiff has claimed that more formal hearing procedures are constitutionally required under the Fourteenth Amendment for disciplinary suspensions of 15 days. The construction of the Pupil Fair Dismissal Act involves three central issues. The first issue is whether the school administration may impose three consecutive suspensions at an initial informal administrative conference. Another issue concerns the question of whether homework is a sufficient alternative program under the Act when students are suspended for more than an initial five-day period. The final issue relates to whether the Pupil Fair Dismissal Act requires a hearing with formal procedures in the event that the suspension period exceeds five school days.

Abstention is not proper where the resolution of the State law issues would not change the nature of the constitutional claim, or obviate the need to determine the constitutional claim. *Zbaraz v. Quern*, 572 F.2d 582 (7th Cir. 1978); Wright, Miller & Cooper, 17 Federal Practice & Procedure,

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in construing this provision is apparent, as the section purports to allow the suspension period to reach 15 school days while unambiguously defining the term "suspension" as an action by the school administration which excludes a student from school for "no more than five school days." The question presented is under what circumstances can suspensions which run for fifteen days be imposed, and what procedures under the statute are required to effectuate suspensions which exceed the five-day maximum. The Minneapolis Board of Education interprets Minn. St. § 127.27, subd. 10 in its Policy No. 5202 as follows:

> [t]he suspension period may, however, be extended up to 15 school days if a determination is made the pupil will create an immediate and substantial danger to persons or property around him and if an alternative educational program is implemented after five days of suspension.

The defendant's interpretation of the Pupil Fair Dismissal Act allows school administrators, in the event a pupil is deemed to present an immediate and substantial danger to others or property around him, to initially impose a 15-day suspension on the pupil. In other words, the defendant's interpretation allows school administrators to impose three five-day consecutive suspensions solely at the initial administrative conference with the student, as opposed to imposing three five-day suspensions piece-meal or on separate occasions.

The object in construing a statute is of course to determine the intention of the legislature, and in doing so, the Court must give effect to all the words of the statute. Minn. St. § 645.16. By definition, suspension is limited to a time frame of no more than five school days. Minn. St. § 127.27, subd. 10. However, the legislature has provided in unequivocal terms in the last sentence of Minn. St. § 127.27, subd. 10 that a suspension of up to 15 days is permissible if the pupil presents the requisite danger, and as long as an "alternative program" is provided after the initial five-day suspension period. In the preceding sentence of subdivision 10, the legislature has articulated the context in which suspensions for more than five days are permissible, and this sentence provides that suspensions "may not be consecutively imposed against the same pupil for the same course of conduct, or incident of misconduct, except where the pupil will create an immediate and substantial danger to persons or property around him." *Id*. Thus, by implication, the legislature has determined that five-day suspensions can be "consecutively imposed" if the pupil presents the requisite danger, but the consecutive terms may not exceed a total of 15 school days, and in the event the time period involved exceeds five days, an "alternative program" must be provided the student. It is evident that the school administration may permissibly impose three five-day suspensions, for a total of 15 days in length. The issue is therefore reduced to whether the school administration, in imposing consecutive suspensions, can do so at the initial informal administrative conference or whether the school administration must wait until the termination of the original five-day suspension, or the second five-day period, to extend the suspension for another five days.

The Pupil Fair Dismissal Act does not expressly address the issue of whether school administrators can impose consecutive suspensions at the initial administrative conference with the pupil. The Court has determined that the school administration may not lawfully impose three consecutive five-day suspensions solely at the initial informal administrative conference. In the view of the Court, the most reasonable construction of Minn. St. § 127.27, subd. 10 requires the school administration to afford a pupil a separate informal administrative conference prior to any five-day or other extension of the original suspension period, whenever the total time for which the student is temporarily removed from school exceeds five school days. At this second or third "informal administrative conference," the pupil and the disciplinarian should discuss the facts and reasons underlying the suspension, whether any mitigating factors or other options exist, and whether the student presents a substantial and immediate danger to persons or property if the pupil were to be readmitted to school after the initial suspension period expires. At the conference, if the disciplinarian is convinced that the student presents a substantial and immediate danger to persons or property around him, the disciplinarian may

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§ 4242 (1978). The issues with respect to the sufficiency of the alternative program provided K. J., or the power of the school administration to impose a 15-day suspension at an initial informal conference, have no bearing or relation to the constitutional issue of whether more formal hearing procedures are required for a 15-day suspension. As these two issues have no relevance to the constitutional questions in issue here, any construction of the Pupil Fair Dismissal Act by a State court as to these State law issues would have no bearing on the necessity to adjudicate the Federal constitutional claim. In short, any resolution of these State law issues by a State court would not "materially change the nature of the problem." *Bellotti v. Baird*, 428 U.S. 132, 147, 96 S.Ct. 2857, 2866, 49 L.Ed.2d 844 (1976), *citing Harrison v. NAACP*, 360 U.S. 167, 177, 79 S.Ct. 1025, 3 L.Ed.2d 1152 (1959). In this context, abstention is not proper. *Zbaraz v. Quern*, 572 F.2d 582 (7th Cir. 1978).

The issue raised by plaintiff as to whether the Act itself requires formal hearing procedures after a five-day suspension period, of course, is certainly relevant to the need to determine the constitutional issue of whether formal hearing procedures are required for a 15-day suspension under the Fourteenth Amendment. However, a "mere absence of judicial interpretation does not necessarily render [the] meaning [of the State law issues] unsettled or uncertain." *B T Investment Mgrs., Inc. v. Lewis*, 559 F.2d 950, 954 (5th Cir. 1977). In the present case, it is absolutely clear that the Pupil Fair Dismissal Act does not afford *suspended* students a formal hearing of any sort. *See* Minn. St. § 127.30, subd. 1. As the state law is "plain and unambiguous" in this regard, abstention would not be proper. *MacBride v. Exon*, 558 F.2d 443, 448 (8th Cir. 1977).

As the Court has determined that abstention in this case would be inappropriate, and as the Court unquestionably has jurisdiction to decide the Federal claims, it is within the discretion of the Court to decide the State law issues under pendent jurisdiction principles. *Hagans v. Lavine*, 415 U.S. 528, 94 S.Ct. 1372, 39 L.Ed.2d 577 (1974). It should be noted that the propriety of abstention is theoretically distinct from the well established Federal policy of refraining from constitutional adjudication where a nonconstitutional pendent claim is dispositive of the case, *infra*.

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extend the initial suspension or impose in effect an additional suspension for a period not to exceed another five days. Under the Court's analysis of the Act, an extension of the initial suspension period is in substance the equivalent of a separate suspension. If, for example, a five-day extension was added to an initial five-day suspension, and the school administration sought to extend the suspension for another five days, under the Court's ruling, the Pupil Fair Dismissal Act would require three informal administrative conferences to be conducted — the first conference prior to the initial suspension or as soon thereafter as practicable, the second conference prior to the first five-day extension, and the third conference prior to the second five-day extension.

Several reasons support the conclusion reached by the Court. First, the legislature unequivocally emphasized that the length of a suspension shall be "no more than five school days." Minn. St. § 127.27, subd. 10. By implication, Minn. St. § 127.27, subd. 10 allows for consecutive suspensions to be imposed provided the total time for which the student is excluded from school does not exceed 15 days, provided an "alternative program" is implemented after the initial five-day period and provided that "the pupil will create an immediate and substantial danger to persons or property around him." While the legislature undeniably sanctioned this practice, it also provided in Minn. St. § 127.30, subd. 1, that "[n]o suspension from school shall be imposed without an informal administrative conference with the pupil . . ."[7] As the legislature defined suspension in five-day increments, it necessarily follows that a conference must be afforded a pupil, if practicable, prior to the imposition of any suspension or extension of any suspension. Moreover, by requiring the administrator to conduct an informal conference or hearing with the student prior to extending the suspension period, the risk of error will be decreased in the administrator's decision as to whether the student presents a substantial and immediate danger to property or others around him. The risk of error cannot be ignored, particularly where a lengthy deprivation, such as the three-week suspension here, is at stake. Under the Court's interpretation, the risk of error will be minimized to some extent, as the requirement of providing a conference before extending the suspension period should mitigate the potentially unwarranted punitive response of school disciplinarians by providing an opportunity to school officials for greater reflection. Further, the student can provide input at these informal conferences as to his or her ability or willingness to conform his or her behavior to the norms of the school. These benefits certainly outweigh any added administrative burdens which might be placed on school officials by complying with these procedures. As for the student who is a continual menace to the school population, property or teaching body, school officals can of course always use the procedures outlined in Minn. St. § 127.31 to expel[8] the troublesome pupil.

In summary, the Court holds that in the event the school administration attempts to temporarily exclude a student from school for more than a five-day period the school is under an obligation by virtue of the Pupil Fair Dismissal Act to provide the student with a separate informal administrative conference prior to extending or adding another suspension to the initial suspension period. At this conference, the disciplinarian and pupil should discuss the facts and reasons underlying the suspension, whether any mitigating factors or viable options exist, and whether the student presents a substantial and immediate danger to others or school property if the student were to be readmitted to school. Only after the school official provides such an opportunity for input from the student, and only after the school administrator makes an informed judgment that the student presents the requisite danger to the school community if readmitted, can the school official extend the suspension period beyond five school days. The same requirements exist for the second extension of the initial suspension as apply to the first extension of the suspension period. Thus, if the school administration seeks to impose a second extension (for example, an extension which would cause the total period in which the pupil is excluded from school to run between 10 and 15 days) of the suspension period, it must provide the pupil with another informal conference before extending the suspension. The

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[7] Minn. St. § 127.30, subd. 1 adds a proviso to its requirement that an informal conference be conducted, when it provides "except where it appears that the pupil will create an immediate and substantial danger to himself or to persons or property around him." A literal reading of this provision would allow school administrators, if they considered a particular student dangerous, to suspend the student without affording the student any hearing whatever. Such an interpretation is not constitutionally permissible. *Goss v. Lopez*, 419 U.S. 565, 582-83, 95 S.Ct. 729, 740, 42 L.Ed.2d 725 (1975). As the *Goss* Court noted:

> it follows that as a general rule notice and hearing should precede removal of the student from school. We agree with the District Court, however, that there are recurring situations in which prior notice and hearing cannot be insisted upon. Students whose presence poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process may be immediately removed from school. In such cases, the necessary notice and rudimentary hearing should follow as soon as practicable . . .

Id. Thus, Minn. St. § 127.30, subd. 1, which provides that an informal administrative conference must be afforded a student except where he presents an immediate and substantial danger to himself or persons or property around him, is designed to allow disciplinarians to immediately remove students from school if the circumstances warrant an expedited removal. The provision is simply not intended to allow school officials to ignore the requirement of a hearing or conference, whether it be an initial administrative conference or the required informal conference before any extension of the original suspension. Therefore, as a general rule, the informal administrative conference should take place prior to the removal of the student from school, and prior to any extension of the original suspension. If the student is demonstrably dangerous to himself, others or school property, so that the temporary presence of the student at the school for an informal administrative conference prior to any extension of the original suspension would present an obvious danger, school officials can legitimately schedule the informal conference with regard to any extension at a more appropriate time.

[8] *See* footnote 5, *supra*.

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Court stops short, however, of requiring the school officials to comply with the notice provisions of Minn. St. § 127.30, subd. 2[9] each time school officials seek to extend or add an additional suspension to the initial period, as to fulfill such procedures would be duplicative and meaningless. It is sufficient for school officials to provide actual notice, whether oral or written, to the pupil or his or her parent of any subsequent informal conferences to be conducted prior to any extension of or addition to the suspension period. As the May 16th suspension of K. J. for 15 days was accomplished without any sort of hearing or conference before the normal five day suspension period was extended, her suspension was unlawful under the Pupil Fair Dismissal Act.

B Hearing Procedures Applicable to Suspensions

The Court has determined that there was no necessity, under the Pupil Fair Dismissal Act, for the defendant to provide more formal hearing procedures in the suspension of K. J., as plaintiff suggests. Plaintiff contends that the Pupil Fair Dismissal Act requires a formal hearing to the extent "dismissals" or suspensions exceed five school days. Plaintiff supports this argument by relying in part on a publication of the Minnesota Department of Education which interpreted Section 127.27, subd. 10, and consistent with this provision, stated: "[i]n suspensions, the student may be sent home for no longer than a *five school day* period." Update, Special Report: Student Bill of Rights, Vol. 9, Special Edition No. 1, p. 7 (Fall, 1974). The role of this Minnesota Department of Education publication, as the publication expressly notes, is an advisory one. In any event, what the publication states is not incorrect — the publication simply omitted any reference to consecutive suspension periods, which, as the Court has interpreted the Act, is clearly permissible under the last two sentences of Minn. St. § 127.27, subd. 10. Plaintiff relies chiefly on language in Minn. St. § 127.31, with respect to the timing of an exclusion or expulsion hearing, to buttress her position that a formal hearing is required for suspensions exceeding five days. The obvious answer to this contention is that Minn. St. § 127.27, subd. 10 allows for consecutive suspension terms to be implemented when a student presents an immediate and substantial danger to persons or property around him, provided the total period for which the student was removed from school does not exceed 15 days. As consecutive suspensions are treated under Minn. St. § 127.27, subd. 10 as suspensions, the plain answer to plaintiff's argument is that the exclusion and expulsion procedures of Minn. St. § 127.31 have no bearing whatever on the 15-day suspension imposed here. For these reasons, plaintiff's arguments must be rejected, as defendant was under no obligation by virtue of the Pupil Fair Dismissal Act to provide a hearing with more formal procedures in the suspension of K. J.

C. Alternative Programs

The final issue presented with respect to the Pupil Fair Dismissal Act is whether the supervised homework provided to K. J. after the inital five-day suspension period satisfied the requirement of Minn. St. § 127.27, subd. 10 that "an alternative program" be provided suspended students after the initial five-day suspension period. In a memorandum addressed to all principals and social workers, the defendant's procedures for instructional services to suspended students provides that homework is a permissible alternative program. This conclusion is also embodied in the defendant's "Demission Guidelines for Principals." The Act, of course, does not define what an alternative program entails, and arguably uses the term in completely different contexts.[10]

Plaintiff's expert, Dr. Bruce E. Balow, stated his opinion that homework did not amount to a sufficient alternative educational program for a student, such as K. J., who was suspended and provided homework during the latter two weeks she was out of school. In explaining his conclusions, Dr. Balow indicated that instruction takes place according to a defined curriculum within an educational environment and with substantial and regular feedback between teacher and student. Dr. Balow based his opinion on the premise that homework is not instructional or educational in nature, particularly where a student has difficulty in managing her own behavior. Dr. Balow reasoned that homework was not edu-

[9] Minn. St. § 127.30, subd. 2, provides:

> A written notice containing the ground for suspension, a brief statement of the facts, a description of the testimony, a readmission plan, and a copy of sections 127.26 to 127.39, shall be personally served upon the pupil at or before the time the suspension is to take effect, and upon his parent or guardian by certified mail within 48 hours of the conference. In the event a pupil is suspended without an informal administrative conference on the grounds that the pupil will create an immediate and substantial danger to persons or property around him, the written notice shall be served either personally or by certified mail upon the pupil and his parent or guardian within 48 hours of the suspension. Service by certified mail is complete upon mailing.

Under the Court's analysis, the school system would still be required under the Act to comply with the notice provisions when implementing an initial suspension.

[10] For example, Minn. St. § 127.29, subd. 1 provides the school shall not "dismiss any pupil without attempting to provide alternative programs of education prior to dismissal proceedings . . ." The provision attempts to define such alternative programs when it provides that the term may include "special tutoring, modification of the curriculum for the pupil, placement in a special class or assistance from other agencies."

In another vein Minn. St. § 127.27, subd. 10 provides that school officials are under an obligation to prepare a "readmission plan" for every suspended student, and that each plan "shall include, where appropriate, a provision for alternative programs to be implemented upon readmission." Finally, Minn. St. § 127.27, subd. 10 again provides that in the consecutive suspension context, "an alternative program shall be implemented" after the five-day suspension period expires.

Thus, the phrase "alternative program" is used in the following contexts: prior to disciplinary action being taken, during the suspension period itself if the period exceeds five days, and upon readmission of the student after the disciplinary sanction expires. The term may not necessarily encompass the same things in all contexts.

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cational as it took place outside of an educational environment and because minimal or no daily feedback existed between teacher and student. Dr. William C. Phillips, Director of Curriculum and Student Services for the Minneapolis Public Schools, disagreed with Dr. Balow, when he stated his opinion that homework was a sufficient alternative program under the Act. As a justification for his opinion, Dr. Phillips pointed out that providing homework has the advantages of economy of time, contact by the student with his or her regular instructors, and the content of the assignment is prescribed by a person (the regular classroom teacher) aware of the child's needs and problems. Thus, for short term purposes, Dr. Phillips concluded that the time tested program of homework was not only a reasonable response to the Act but an adequate educational alternative program for suspended students. Dr. Arnold M. Rehmann, Director of Special Education for the defendant schools, agreed in substance with Dr. Phillips that homework was a sufficient alternative program, and defined an alternative program as something which varies from the regular educational process with regular students in a traditional classroom.

Plaintiff concentrates her arguments on the proposition that K. J.'s poor academic record and history of an unwillingness to work or complete assignments should have led the school system to prescribe a more supervised or elaborate educational program for K. J. while she was suspended. The position that plaintiff advocates can be summarized as requiring the school administration to provide an individually tailored program for each suspended student which includes instruction within an educational environment according to a defined curriculum and with a substantial degree of student-teacher interaction.

The decision as to the appropriateness of an alternative program for suspended students is not a mechanical one, but affords school officials a significant degree of discretion. This discretionary determination is essentially an instructional decision. The determination of an adequate alternative program is not a disciplinary function. The involvement of the federal judiciary in the public school system serves at times important roles. *Goss v. Lopez*, 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975); *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969); *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954). However, the Federal courts are ill equipped to serve as arbiters of decisions by school officials which are primarily academic or instructional in content. *Board of Curators of the University of Missouri v. Horowitz*, 435 U.S. 78, 98 S.Ct. 948, 55 L.Ed.2d 124 (1978). In light of the historical control extended to school officials in making instructional decisions, and the discretionary nature of the determination as to the adequacy of an alternative program for suspended students, the Court has concluded that such a determination can be deemed unlawful only if it is established that school authorities acted or failed to act with a manifest abuse of discretion.

In this case, the Court has concluded that no such abuse of discretion has been established as to the adequacy of the alternative program provided to K. J. while she was suspended from Anwatin Middle School. The testimony of Dr. Phillips pointed out the advantages of homework as an alternative program, and while it perhaps would have been desirable to provide additional avenues of instruction, the Court cannot say with any assurance that school officials manifestly abused their discretion under the Pupil Fair Dismissal Act in making this peculiarly educational decision. However, in making this determination, the Court does not hold that under all possible circumstances supervised homework is a sufficient alternative program for students suspended from school. All the Court decides is that under these circumstances, the school administration's provision of supervised homework for K. J. while she was suspended was not a manifest abuse of discretion.

II.
Federal and State Statutes and Regulations on Education for Handicapped Children

The plaintiff contends that school officials realized or should have realized that K. J., in light of her emotional difficulties, was a handicapped student as that term is defined in Federal and State law.[11] Plaintiff postulates that as a handicapped or special education student, school officials were under an obligation to provide more formal hearing procedures in the suspension of K. J. As school officials had arranged for academic and psychological evaluation of K. J. prior to the time K. J. was suspended on May 16th, plaintiff also argues that the State special education rules are relevant, and that the school administration may not suspend students

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[11] 20 U.S.C. § 1401(1) defines "handicapped" as follows:

> The term "handicapped children" means mentally retarded, hard of hearing, deaf, speech impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, or other health impaired children, or children with specific learning disabilities, who by reason thereof require special education and related services.

State law, in Minn. St. § 120.03, defines handicapped children, and provides:

> Subdivision 1. Every child who is deaf, hard of hearing, blind, partially seeing, crippled or who has defective speech or who is otherwise physically impaired in body or limb so that he needs special instruction and services, but who is educable, as determined by the standards of the state board is a handicapped child.
>
> Subd. 2. Every child who is mentally retarded in such degree that he needs special instruction and services, but who is educable as determined by the standards of the state board, is a handicapped child.
>
> Subd. 3. Every child who by reason of an emotional disturbance, or a learning disability, or a special behavior problem needs special instruction and services, but who is educable, as determined by the standards of the state board is a handicapped child.
>
> Subd. 4. Every child who is mentally retarded in such degree that he requires special training and services and who is trainable as defined by standards of the state board is a trainable handicapped child.

Presumably, plaintiff's claim that K. J. is handicapped is because she is seriously emotionally disturbed.

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without providing a hearing with the formal procedures contemplated by the Minnesota special education regulations.

The Education of All Handicapped Children Act, 20 U.S.C. § 1401 *et seq.* was enacted to insure that all handicapped children are afforded a free appropriate public education which concentrates on the unique needs of the individual student. Also, the Act was designed to provide procedural protections to handicapped students and their parents in decision making areas which relate to the students' right to a free appropriate public education. *See generally Lora v. Board of Education of City of New York*, 456 F. Supp. 1211 (ED NY 1978). Thus, as the Act requires that States which receive Federal assistance provide for elaborate due process hearing procedures whenever a change in a student's educational placement is proposed, requested or refused, the Act affords handicapped children and their parents extensive rights. Minnesota receives Federal assistance within the meaning of the Act. The regulations of the Department of Education are embodied in 5 MCAR EDU 120-128, and these regulations provide extensive procedural protections for handicapped children and their parents.

The plaintiff urges that officials of the defendant school system possessed sufficient information to determine that K. J. was a handicapped student. Relying on the Minnesota regulations and *Mills v. Board of Education of District of Columbia*, 348 F. Supp. 866 (D DC 1972), plaintiff contends that children who are "thought by" the defendant to be handicapped are entitled to formal hearing procedures in the event of a suspension. Plaintiff's argument concerning K. J.'s status as a handicapped student is without merit. First of all, plaintiff completely failed to prove that school officials, prior to or at the time of K. J.'s suspension, had sufficient knowledge that K. J. was "seriously emotionally disturbed" or learning disabled to the extent that she was handicapped within the meaning of Federal or State law. 20 U.S.C. § 1401(1); Minn. St. § 120.03. The formal educational assessment process is designed to help determine if a student is a handicapped child. Such an assessment had already been instituted at the time K. J. was suspended, but the results of her academic and psychological evaluation were not known at the time of her suspension.

More importantly, plaintiff's argument that the school system should have treated K. J. as a handicapped or special education student based on the suspicions of school officials is plainly inconsistent with and undermined by Federal and State law governing the initial classification of children as handicapped students. The procedure by which a student is identified or classified as handicapped and thereby afforded special services formally begins with the assessment process. 5 MCAR EDU 120B.12. defines an assessment as "an individual evaluation, conducted in accordance with recognized professional standards and the provisions of EDU 124, of a person's performance and/or development for the purpose of determining the need for initiation or change in his or her educational program including special education services." State regulations provide that an assessment must be conducted when, because of a child's handicapping condition(s) or performance, the child "is thought by the school district to be in need of possible initiation or change in the student's educational placement . . ." 5 MCAR EDU 124B.1.(a). Before any assessment can be accomplished, Federal law and State regulations provide that written notice be given to parents which describes the nature of the assessment and the rights of the child and parent. 20 U.S.C. § 1415; 5 MCAR EDU 127B. Among these rights afforded parents and their children are the rights to object and be afforded a hearing on the issue of whether the school administration should propose or refuse to "initiate or change" the "identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child . . ." 20 U.S.C. § 1415(b)(1)(C). These hearing procedures are clearly designed to minimize the risk of misclassification of children as handicapped or not handicapped, and to provide input of the parent and child in the identification or classification decision. *Lora v. Board of Education of the City of New York*, 456 F. Supp. 1211, 1227 (ED NY 1978). Thus, the schools are under a clear obligation to make the classification decisions through an exclusive formal process with the input of parent and child. The plaintiff's argument is simply incongruous, as to accept the plaintiff's assumption that school officials should have treated K. J. as a handicapped student based on the suspicions of the school officials would require the defendant to ignore and even violate Federal and State law concerning the classification or identification decision of a student as handicapped and in need of special services.[12] To approve plaintiff's argument would thus defeat the purpose and promise of this important legislation and impose an impossible burden on school officials. As of May 16, 1977, K. J. had not been identified as a handicapped or special education student under the procedures required under Federal or State law. For these reasons, the Court has determined that school officials had no obligation to treat K. J. as a handicapped or special education student on May 16, 1977, when the 15-day suspension was imposed. Consequently, it was unnecessary for the defendant school system to provide additional hearing procedures or a formal hearing with respect to the May 16th suspension of K. J.[13]

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[12] In light of the pervasive Federal and State regulations with respect to the initial classification determination that a child is handicapped, language contained in *Mills v. Board of Education of District of Columbia*, 348 F.Supp. 866 (D DC 1972), which requires children to be treated as handicapped if "thought" to be handicapped, is clearly distinguishable. *See* 20 U.S.C. § 1415; Minn. St. § 120.17, subds. 3a and 3b.

[13] Plaintiff, relying on 20 U.S.C. § 1415(e)(3) and 5 MCAR EDU 127B.13, argues that as K. J. was the subject of an ongoing educational assessment, the defendant could not change her educational placement during the pendency of the assessment, and as the suspension operated to alter her placement, the suspension was unlawful. This argument is deficient in a number of respects. Under the State regulations, a parental objection is necessary to preclude the school from changing the student's placement. There was no parental objection here. Nor had there been a judicial or administrative proceeding instituted under the Act, as the regulations require. Moreover, *Stuart v. Nappi*, 443 F. Supp. 1235 (D. Conn. 1978), relied on by plaintiff, supports the opposite conclusion than that advocated by plaintiff. In *Stuart*, the court preliminarily enjoined a school defendant from attempting to *expel* a handicapped student who had formally

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III.
Constitutional Arguments

In *Goss v. Lopez*, 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975), high school students challenged the constitutionality of disciplinary suspensions which were imposed without any prior or subsequent hearing. The *Goss* Court articulated its holding as follows:

> due process requires, in connection with a suspension of 10 days or less, that the student be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story.

Id. at 581, 95 S.Ct. at 740. The *Goss* Court qualified its holding, however, when it stated:

> [w]e should also make it clear that we have addressed ourselves solely to the short suspension, not exceeding 10 days. Longer suspensions or expulsions for the remainder of the school term, or permanently, may require more formal procedures. Nor do we put aside the possibility that in unusual situations, although involving only a short suspension, something more than the rudimentary procedures will be required.

Id. at 584, 95 S.Ct. at 741 As noted, there is no controversy with respect to whether the required "informal give-and-take between student and disciplinarian" was followed by assistant principal King prior to the May 16th suspension of K. J. Plaintiff, however, contends that because *Goss* limited the scope of its holding to suspensions of 10 days or less, and as the suspension of K. J. amounted to 15 days, a more formal hearing is constitutionally required due to the increased severity of the deprivation. *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).

As the Court's decision has found that the suspension of K. J. was unlawfully accomplished under the Pupil Fair Dismissal Act, plaintiff is entitled to the relief she seeks, namely, a declaratory judgment that the suspension of K. J. was unlawful and expungement of any reference to the suspension from her school records. It was incumbent on the Court to consider plaintiff's pendent state law claims prior to a determination of any Federal constitutional issues. *New York City Transit Authority v. Beazer* 440 U.S. 568, 582, 99 S.Ct. 1355, 59 L.Ed.2d 587 (1979). The Court unquestionably has pendent jurisdiction over plaintiff's State law claims under the Pupil Fair Dismissal Act and the Minnesota regulations concerning handicapped students. *Hagans v. Lavine*, 415 U.S. 528, 94 S.Ct. 1372, 39 L.Ed.2d 577 (1974). It is well settled that if a pendent claim, whether it be State or Federal, disposes of the case and is sufficient to provide plaintiff with the relief sought, it is unnecessary to determine Federal constitutional issues, and a Federal court in these circumstances should refrain from constitutional adjudication. *Hutchinson v. Proxmire*, ___ U.S. ___, 99 S.Ct. 2675, 61 L.Ed.2d 411 (1979); *New York City Transit Authority v. Beazer*, 440 U.S. 568, 582, 99 S.Ct. 1355, 1364, 59 L.Ed.2d 587 (1979); *FCC v. Pacifica Foundation*, 438 U.S. 726, 734, 98 S.Ct. 3026, 57 L.Ed.2d 1073 (1978); *Hagans v. Lavine*, 415 U.S. 528, 94 S.Ct. 1372, 39 L.Ed.2d 577 (1974). Consistent with this well established Federal policy of avoiding the unnecessary adjudication of constitutional issues, the Court has determined that it is unnecessary to reach the constitutional arguments asserted by plaintiff, and leaves the resolution of this issue for a future controversy.

IV.
Relief

Plaintiff is entitled to a declaratory judgment that the 15-day suspension imposed on K. J. was unlawful under State law. 28 U.S.C. § 2201. Moreover, plaintiff is entitled to have any reference to the May 16th suspension expunged from any school records of defendant containing such a reference. *Strickland v. Inlow*, 519 F.2d 744 (8th Cir. 1975). Plaintiff is entitled to equitable relief even if the grounds for her suspension were appropriate, and even if she would have been suspended in any event, as the procedures utilized by the defendant were deficient under the Pupil Fair Dismissal Act. *Piphus v. Carey*, 545 F.2d 30, 32 (7th Cir. 1976), *rev'd on other grounds*, 435 U.S. 247, 98 S.Ct. 1042, 55 L.Ed.2d 252 (1978). In the event that counsel for the parties cannot agree as to a reasonable amount of attorneys' fees to be awarded plaintiff's counsel pursuant to 42 U.S.C. § 1988, plaintiff's counsel may, within a reasonable time, apply to the Court for an order awarding attorneys' fees.

IT IS THEREFORE ADJUDGED that the May 16, 1977, disciplinary suspension of K. J. was unlawfully accomplished under the Minnesota Pupil Fair Dismissal Act and

IT IS THEREFORE ORDERED that defendant delete and expunge any reference to said suspension from any records in its possession or under its control.

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objected to her educational program, as to do so would operate as a change in her educational placement during the pendency of her special education complaint in violation of 20 U.S.C. § 1415(e)(3). The court in *Stuart*, however, expressly found that the disciplinary measure of suspension, as opposed to an expulsion, would "permit the child to remain in his or her present placement . . ." *Id.* at 1242. The position adopted in *Stuart* is consistent with the Federal and State regulations on the issue. *See* Comment to 45 C.F.R. § 121a.513; 5 MCAR EDU 120a.7 (providing that the special education rules may apply in exclusion and expulsion proceedings, as opposed to suspensions). As the temporary disciplinary measure of suspension does not operate to change or alter a student's educational placement, plaintiff's argument is without merit.

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P-1 by and through his mother and next friend, M-1; P-2 by and through his mother and next friend, M-2; P-3 by and through his father and next friend, M-3; P-4 by and through his mother and next friend, M-4; P-5 by and through his mother and next friend, M-5; P-6; P-7 by and through his mother and next friend, M-7; P-8 by and through his mother and next friend, M-8; P-9 by and through his mother and next friend, M-9; P-10 by and through his mother and next friend, M-10; P-11 by and through his mother and next friend, M-11,

Plaintiffs

v.

MARK SHEDD, individually and as Commissioner, State Department of Education, FRANCIS MALONEY, individually and as Commissioner, Department of Children and Youth Services,

Defendants

BARBARA BRADEN, individually and in her capacity as Acting Superintendent, Hartford Public Schools, KATE CAMPBELL, FREDERICK BASHOUR, ROBERT BUCKLEY, CURTISS CLEMMENS, JIMMIE BROWN, MARIA SANCHEZ, BARBARA KENNY, M. SUSAN GINSBERG, MYLES HUBBARD, individually and in their official capacities as members of the Hartford Board of Education

Defendants and Third Party Plaintiffs

v.

THE CITY OF HARTFORD, JOHN A. SULIK, City Manager of the City of Hartford, JOHN P. WALSH, Director of Finance of the City of Hartford, GEORGE ATHANSON, Mayor of Hartford, NICHOLAS R. CARBONE, OLGA W. THOMPSON, WILLIAM DIBELLA, RICHARD SUISMAN, MARGARET TEDONE, SYDNEY GARDNER, MILDRED TORRES, ROBERT LUDGIN, and RAYMOND MOTEIRO, members of the Court of Common Council of the City of Hartford,

Third Party Defendants

No. 78-58

D. Connecticut
March 23, 1979
T. EMMET CLARIE, Chief Judge

Action on behalf of six children in the Hartford, CT, School System claimed that State Commissioner of Education, Superintendent, and Members of Hartford

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Board of Education denied plaintiffs their right to a free and appropriate program of special education in violation of the Education for All Handicapped Children Act, Pub. L. 94-142, and the due process and equal protection clauses of the U.S. Constitution by denying, in some instances, certain procedural protections, failing to provide proper individualized education programs, and delaying placement in appropriate programs for up to two years.

Although number of plaintiffs was increased to 11, class certification was denied; additional defendants, *i.e.*, Mayor, City Manager, Director of Finance and Members of Hartford City Council, and Commission of State Department of Children and Youth Services, were added.

Following pre-trial motions, including denial of defendants' motion to dismiss, and certain changes in the Hartford special education system—addition of new staff for special education, development of certain standard forms, initiation of programs of in-service training of special education personnel, and reforms in identification, evaluation and programming, the parties agreed to the entry of a consent decree, the terms of which satisfy the specific educational needs of the named plaintiffs. Moreover, under the decree, the policies, practices and procedures are to serve to benefit other handicapped children in the Hartford School System, and are to be fully implemented by September 1, 1979. The decree is ordered on the agreement that nothing stated therein shall constitute an admission by the defendants of any unlawful practices, nor an admission by the plaintiffs that the decree fully satisfies defendants' obligations under Pub. L. 94-142, the Rehabilitation Act of 1973, § 504, the due process and equal protection clauses of the U.S. Constitution, or the Connecticut General Statutes.

The provisions of the consent decree concerning specific subject areas will be found at the page indicated under the following index:

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Robert Nagy, Esq. Assistant Attorney General, 90 Brainard Road, Hartford, CT 06114, Defendant Department of Children and Youth Services

INTRODUCTION

1. This case was first instituted on February 1, 1978 on behalf of six named children in the Hartford School System who were alleged to be in need of special education programs and services, and their parents. The complaint, alleged that they were being denied the right to a free and appropriate program of special education guaranteed to them by the Education for All Handicapped Children Act, 20 U.S.C. § 1401 *et seq.*; and the Due Process and Equal Protection Clause of the United States Constitution.

2. Subsequent to the filing of the complaint, the Court granted Plaintiffs' Motion to Intervene additional plaintiffs, bringing the present number of named plaintiffs to eleven. The Court denied plaintiffs' Motion for Class Certification and denied defendants' Motion to Dismiss. The named plaintiffs are proceeding in fictitious names.

3. Named as defendants were the Commissioner of Education of the State of Connecticut, and the Superintendent and Members of the Hartford Board of Education. The Mayor of Hartford, City Manager, Director of Finance and Members of the City Council were added as defendants by a

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Third Party Complaint filed by the Hartford School Defendants. The Commissioner of the Connecticut State Department of Children and Youth Sevices was added as a defendant by plaintiffs.

4. The named plaintiffs alleged, *inter alia* , that they were entitled to free and appropriate programs of special education in that they met the definition of "handicapped" at 20 U.S.C. § 1401(1) and were in need of special education. The named plaintiffs include children suffering handicaps such as learning disabilities, deafness, health impairments, mental retardation and serious emotional disturbances. The named plaintiffs alleged that in some instances they were denied procedural protections, lacked proper individualized educational programs, and experienced delays of up to two years before being placed in appropriate programs, all in violation of federal law.

5. In order to avoid the burden, delay, and cost of continued litigation of the plaintiffs' claims for relief, the plaintiffs and defendants have agreed to the entry of the following Consent Decree, which satisfies the specific educational needs of the named plaintiffs. Nothing stated in this Consent Decree shall constitute an admission by the plaintiffs that the decree fully satisfies the defendants' obligations under the Education for All Handicapped Children Act, the Rehabilitation Act of 1973, Due Process and Equal Protection Clause of the United States Constitution and the Connecticut General Statutes.

6. Prior to and since the filing of this complaint, the Hartford School defendants have taken certain actions some of which are described in paragraph 7, which address the needs and demands of handicapped children in Hartford. A continuation of those efforts and expected compliance with the terms of the following Consent Decree will be assigned to benefit both the named plaintiffs and those other children who meet the definition of "handicapped" at 20 U.S.C. § 1401(1), and who are in need of special education.

7. Prior to and since the filing of this complaint against the Hartford Board of Education, these defendants claim that numerous changes were made in the special education system which changes include: the addition of seventeen new staff members for special education, the development of certain standard forms, initiation of programs of in-service training of special education personnel, and reforms in identification, evaluation and programming of children in need of special education.

8. In view of the above, the parties hereto have mutually agreed that the policies, practices and procedures contained in this Consent Decree are applicable to the eleven named plaintiffs and shall also serve to benefit other handicapped children in the City of Hartford. Therefore, the terms of this Consent Decree shall be fully implemented as policies and practices throughout the Hartford School System by September 1, 1979.

THEREFORE, the parties having agreed to the terms and conditions as described herein it is hereby ORDERED, ADJUDGED AND DECREED and the parties mutually agree, that the following be entered as an ORDER subject to the approval of this Court:

I.

PROGRAMMING AND PLACEMENT FOR THE NAMED PLAINTIFFS

A.

1. Following the appointment of the Court Expert (as set forth in Section II herein) the Court Expert will participate in all Pupil Appraisal Team (hereafter PAT) sessions and any hearings or review sessions concerning the named plaintiffs in this action. In addition, the Court Expert will provide monthly progress reports concerning each named plaintiff from the school institutions or facilities serving the student. These reports will be sent to counsel and will describe the students' progress in meeting the annual goals and short-term instructional objectives described in the student's Individualized Educational Program (hereinafter IEP). In addition, there will be provided at least twice yearly reviews of each named plaintiffs' IEP although more frequent PAT meetings may be convened if the student or school so requests.

B.

1. The Hartford School defendants shall provide P-1 with diagnostic speech therapy by a bilingual speech therapist within ten (10) days after this Consent Decree is signed by the parties. This therapy shall be for not less than two hours per week and shall be provided during the time when P-1 was previously in a vocational readiness program; in no event will the total number of hours of bilingual academic instruction which P-1 has been receiving be diminished because of the provision of speech therapy. A PAT meeting will be scheduled and convened within twenty (20) days of the signing of this Consent Decree by the parties to review and revise the IEP for P-1. At this meeting, the participants including the Court Expert will specifically provide for strengthened vocational training, counselling, and life skills training for P-1; also, provision will be made to increase the Hartford school defendants' training of P-1 on the use of public transportation.

2. The Commissioner of Education will be provided, by the appropriate schools, copies of all IEPs and progress reports concerning P-2. The Commissioner will be responsible for monitoring the programs and services provided P-2 and for ensuring that his IEP is implemented and that he receives a free appropriate public education. Such responsibility will extend through the school year 1978-1979. In particular, the Commissioner or this designee will conduct two on-site visits to monitor the above; the first within twenty (20) days of the signing of this Consent Decree, and the second at the end of the school year 1978-1979. Reports on the visits shall be sent to Court Expert. The Hartford School defendants have no responsibility as to the program and placement of P-2 as long as he is not a resident of the school district.

3. Within twenty (20) days of the signing of this Consent Decree, a PAT meeting will be convened with the

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participation of the Court Expert to review and revise the IEP for P-3. The PAT meeting shall add as annual goals to the IEP for P-3 that he be enrolled in a mainstreamed program at Hartford High School by the second semester, 1978-1979, with the provision of one-on-one tutorial assistance by appropriate certified personnel for not less than two hours per week; formulation of a program which, if successfully completed, would result in the receipt of a regular high school diploma for P-3; provision of driver's education training provision to allow P-3 time for regular after school work, and provision for regular guidance counselling with a goal of college admission after completion of high school. Any or all of the above services, while they may be provided in cooperation with other public or private agencies, remain the responsibility of the Hartford school defendants.

4. Within ten (10) days of the signing of this Consent Decree by the parties, the Hartford Public School defendants will provide P-4's mother, the Court Expert, and plaintiffs' counsel a detailed written description of the program being made available at Woods Lane School and of the reasons why the District feels that the educational program is or is not appropriate for P-4, based on the results of the evaluations conducted by the Woods Lane School, and any other evaluations or other information.

5. Within twenty (20) days after the signing of this Consent Decree by the parties, a PAT meeting will be convened to review the IEP for P-5. Present at this meeting will, in addition to the usual participants and the Court Expert, be staff members from Riverview who participate in her educational and in her clinical programming and a respresentative from the noncomitted program of the Department of Children and Youth Services. The IEP formulated at this meeting will include specific provisions concerning placement after P-5 is discharged from Riverview, including planning for whatever supportive services will be provided should she be placed in public high school.

6. Within ten (10) days after the signing of this Consent Decree by the parties, the Hartford School defendants will convene a PAT to formulate an IEP for P-6. This IEP will be formulated in consultation with the Court Expert, M-6, Hartford school defendants, a representative of, or other input from the Woodrow Wilson School in Virginia, and designees of the Commissioner of Education, and the Division of Vocational Rehabilitation. The IEP shall include provision for training in oral and written expression, counselling, medical services, appropriate vocational training and all supportive and related services to be provided where appropriate. The Hartford school defendants may in the IEP provide that certain services be provided by the Division of Vocational Rehabilitation. The Hartford school defendants shall be responsible for services and programming until the end of the school year in which P-6 reaches 21. At age 21, the parties anticipate that P-6 will have been certified as eligible for services from the Division of Vocational Rehabilitation.

If P-6 is denied eligibility for services provided by the Division of Vocational Rehabilitation, he and his counsel will avail themselves of the administrative procedures provided for in federal law and regulation. The matter will then be referred to the federal court for resolution.

If P-6 is declared eligible, the Division will provide services in accordance with an Individual Written Rehabilitation Program (IWRP) to be developed with P-6, and/or his representatives. Such IWRP will include services such as vocational training, remedial training, physical restoration, counselling and guidance, occupational tools, maintenance while in training, books and supplies, transportation while in training, all as is necessary, needed and appropriate until such time as he is determined to be rehabilitated, or he is no longer eligible for such services, as specified under federal regulations.

7. Within fifteen (15) days of the signing of this Consent Decree by the parties, a PAT meeting shall be convened to review and revise the IEP for P-7. The IEP for P-7 shall include provisions specifically outlining future programs and placement for P-7. The Court Expert will be responsible for monitoring the programs and services provided P-7 and for insuring that her IEP is implemented, and that P-7 receives a free appropriate public education.

The plaintiff, Hartford school defendants, and defendant Commissioner of Education and the Department of Children and Youth Services agree to submit the question of responsibility for non-tuition costs to a reconvened state hearing panel. Said panel shall be convened within one month of this Consent Decree, and the parties agree to abide by the decision of that panel as a final arbiter on the question of responsibility for costs.

8. Within ten (10) days of the signing of this Consent Decree, a PAT will be convened to formulate a new IEP for P-8. With the participation of the Court Expert, the IEP will provide for placement in a residential closed setting with strict behavioral controls and educational programming appropriate to her needs.

9. Within ten (10) days of signing this Consent Decree, a PAT meeting will be convened with the participation of the Court Expert to formulate an IEP for P-9. The IEP will provide for; appropriate, accessible, full time and remunerative job placement, driver's education, three (3) to five (5) hours per week of programming for P-9's learning disabilities, and will include as an annual goal return to high school preceded by appropriate planning.

10. Within ten (10) days of the signing of this Consent Decree a PAT will be convened with the participation of the Court Expert to formulate an IEP for P-10. Within ten (10) days of that meeting, P-10 will be placed in a residential program of special education suited to deal with learning disabled and emotionally disturbed children. The IEP as formulated will furthermore provide for psychotherapeutic counselling.

11. Within ten (10) days of the signing of this Consent Decree by the parties, a PAT meeting will be convened by the Hartford school defendants with the participation of the Court Expert to formulate an IEP for P-11. The IEP for P-11 shall provide for placement in a full-time, bilingual program for the learning disabled, a program which must be implemented within fifteen (15) days of the signing of this Consent Decree by the parties.

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C.

These actions of these defendants as outlined above shall serve to benefit the named plaintiffs and shall not be construed as appropriate programming for other handicapped children.

D.

All action relating to the named plaintiffs shall be in accordance with the practices and procedures hereinafter stated in all sections of this Consent Decree, and where the services and programming specifically enumerated above for the named plaintiffs are not recommended by the PAT, the matter will be referred to the Court Expert under Section II herein.

II. COURT EXPERT

A. Access to Information

1. The Court with the consent of the parties finds that the appointment of a Court Expert is necessary to oversee the implementation of this Consent Decree as it relates to the named plaintiffs. Therefore, pursuant to Rule 53 Fed. Rules Civ. Pro., and in the exercise of the Court's equitable powers, the Court shall approve the appointment of a Court Expert acceptable to all parties, with the power and duty to plan, organize, direct, supervise and monitor this and any further Orders of the Court. All defendants and plaintiffs, their successors, officers, agents, servants, employees, attorneys and all persons in active concert or participation with them shall provide the Court Expert with access to all premises, records, documents, personnel and students and with every other cooperation and service necessary to the discharge of the Court Expert's duties and shall make available to the Court Expert the assistance of the Hartford Board of Education and the Connecticut State Department of Children and Youth Services and the Connecticut State Department of Education as may be necessary to execute this Consent Decree and any subsequent order of the Court.

B. Compensation

1. The Court Expert shall be appointed by the Commissioner of Education of the State of Connecticut, subject to the approval of the parties and of the Court.

2. The Court Expert shall engage such staff, subject to prior review and recommendation of the Commissioner of Education, as he or she finds necessary, only with the prior approval of the Court. The Court Expert and his or her staff shall be compensated by State Department of Education and shall serve until the end of the school year 1979-1980. All rates of compensation, including staff compensation, shall be subject to the approval of the Commissioner of Education of the State of Connecticut and shall be fixed by the Court or subject to Court approval. Within ten (10) days of the approval of this Consent Decree by the Court, counsel for plaintiffs shall submit an appropriate Order of Compensation for the Court Expert. Compensation to the Court Expert shall not exceed ($8,000) eight thousand dollars except for good cause and with the prior approval of the Court. The term of the Court Expert may be terminated and the Court Expert replaced by agreement of counsel, subject to the Dispute Resolution procedures at Section XII.

C. Duties, Resources, Training

1. The duties of the Court Expert shall include, but not be limited to, the following:

(a) to monitor the provision of a free and appropriate public education to each of the named plaintiffs according to the terms and provisions of the Education for All Handicapped Children Act, 20 U.S.C. § 1401 *et seq.* and the Rehabilitation Act of 1973, 29 U.S.C. § 701 and § 704, and to report such to the Court and counsel every month;

(b) to participate in all PATs, state reviews, hearings, and other meetings regarding the named plaintiffs including those held for the purpose of evaluation, prescription of an appropriate placement and the developing of an IEP for each of the named plaintiffs;

(c) to monitor the efforts of the Hartford school defendants to secure proper placement and/or programs for the named plaintiffs and to report such to the Court and counsel every month;

(d) to arbitrate any disputes between the parent and child and the defendants when such arise, in accordance with the procedures specified below at D;

(e) to approve or disapprove prior to placement, any agreement between the parents of the named plaintiffs and the Hartford School defendants, that the child be placed in an appropriate alternative temporary placement with supportive and related services pursuant to Section IV 1(b) and monitor until fully appropriate placement is achieved;

(f) to approve, prior to the placement of any of the named plaintiffs, that the child be placed either on a temporary or permanent basis in a program of homebound or hospitalized instruction pursuant to Section IV 1(c), and as to the named plaintiffs, to monitor the provision of homebound instruction through appropriate means which will include as a minimum, receipt of documentation as to monitoring of the assigned teacher and confirmation of services by the child or parent in addition to and in accordance with Section IV 1(c), (d), and (e);

(g) to monitor, as to the named plaintiffs, the provision of special education at alternative learning centers by regular on-site visits, and to be provided appropriate documentation to carry-out said monitoring responsibility over such centers in addition to and in accordance with the requirements of Section IV 1(c), (d) and (e);

(h) to receive documentation of whatever good faith attempts to place have been made by the Hartford

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school defendants, as to the named plaintiffs, in the instance where a residential placement cannot be secured within thirty (30) days of obtaining parental consent for placement pursuant to Section VII A (1);
(i) to insure, as to the named plaintiffs, that designated personnel are responsible for and will document that all notices, forms, etc. are in fact sent to the named plaintiffs and/or their parents in accordance with the timelines of Section VII Subsection A;
(j) to be informed within twenty-four (24) hours of any emergency suspension of a named plaintiff, and the reasons therefore, and in addition to have authority to revoke an emergency suspension prior to the convening of a PAT upon a finding that the reasons presented do not warrant such removal pursuant to Section VIII A (2).

2. In order to assist the Court Expert in understanding and evaluating the provision of a free and appropriate special education for the named plaintiffs, the Hartford school defendants shall inform the Court Expert of the current status of, and any changes in the following:

(a) the development and provision of in-service staff training programs for the special education staff and supervisors;
(b) the development of uniform procedures for the identification and evaluation of children in need of special education;
(c) structural changes in department of special education of the Hartford Board of Education;
(d) the changes in programs of special education or in the job responsibilities of administrators and/or teachers of special education.

3. Within thirty (30) days of the signing of this decree by the parties, the Hartford Public School District shall provide to the Court Expert, with one copy being provided to plaintiffs' counsel, a directory of all special education programs and services available in the District. This directory, which shall be updated on a monthly basis, shall include the name, address, and full description of each program or service listed. The directory shall be made available to all professional employees of the District and all public and private social service agencies in the City of Hartford. The directory shall also be made available to any person who requests a copy.

D. Method of Dispute Resolution

Any dispute regarding the provision of a free and appropriate education to the named plaintiffs shall be resolved as follows:

(1) the matter including a dispute regarding a recommendation of a PAT shall first be brought to the Court Expert who shall attempt to arbitrate the matter;
(2) if a parent or child or the school authorities are dissatisfied with the arbitration result, they shall notify the Court Expert who shall commence a meeting of counsel;
(3) if counsel are unable to resolve the matter, the dispute shall be presented to the Court or, subject to the agreement of the parties, the United States Magistrate.

As to the named plaintiffs, the parties agree that the above procedures shall be used in lieu of any state hearing or mediation.

III. FREE AND APPROPRIATE EDUCATION

1. The Hartford Public School District will provide and the State Department of Education will ensure a free appropriate public education to all handicapped children between the ages of five and twenty-one according to the terms and provisions of Public Law 94-142, the Education for All Handicapped Children Act, 20 U.S.C. §§ 1401 *et seq.*, § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 701 and § 794, and the implementing regulations adopted pursuant to each statute, 45 C.F.R. Parts 121a and 84. The Hartford Public School District shall make available special education and related services which: are provided at public expense at no charge to the student of his/her family; are provided under public supervision and direction; meet the standards of the Connecticut State Department of Education and the standards set forth in the federal statutes and regulations described above; consist of programs in the least restrictive educational environment appropriate to each child's individual needs; and are provided in conformity with individualized educational program which meet the requirements of 45 C.F.R. §§ 121a.340 through 121a.349.

2. Where the conditions of paragraph 5 below are met, any issue related to responsibility for payment or reimbursement of costs for tuition, room and board, and related or supportive services shall not except the defendants from meeting the timelines set forth in Section VII for identification, evaluation, placement or any other requirements of federal and state law. In no event shall the Hartford school and the State Department of Education be excused from full compliance due to an issue regarding payment of cost by the Hartford school defendants, or applicable reimbursement by the State Education defendant.

3. This section shall not preclude the Hartford School defendants from seeking reimbursement from any sources, public or private, where appropriate except that in no event shall reimbursement be sought from the parent, natural guardian or child for the cost of tuition, room and board or any related or supportive services included in the child's individualized educational program (hereinafter IEP).

4. In the event that a handicapped child is placed by any party other than the Hartford school defendants, including but not limited to, the Departments of Children and Youth Services, Mental Retardation, and Vocational Rehabilitation or the Superior Court, the Hartford defendants remain solely responsible for educational programming and the State Education defendants remain responsible for ensuring com-

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pliance with federal and state law for educational programming until such time as they are notified in writing that the child has been admitted to a Special School District under the jurisdiction of a state agency, pursuant to Conn. Gen. Stat. §§ 17-429, 17-418, 18-81, 54-120, 19-575, and 18-99.

5. In any case, at such time as a child is identified as handicapped and in need of special education by the Hartford school defendants, and is further found, pursuant to due process procedures set forth at 45 C.F.R. 121a.506 to 121a.513, to need placement in a residential public or private facility, in that such placement is necessary to provide special education and related services (45 C.F.R. 121a.302, 45 C.F.R. 84.33(c)(3)), the Hartford school defendants remain solely responsible for payment of costs incurred for tuition, room and board and related and supportive services such as are defined as appropriate at 45 C.F.R. 121a.302.

6. This section shall not preclude the Hartford school defendants from contracting with other public agencies for the provision of such services, except that these Hartford school defendants shall remain the sole obligees for ensuring that free and appropriate placement is secured within the timelines as stated in Section VI, and the State Education defendants shall remain responsible for ensuring compliance.

7. The term "handicapped child" when used herein shall include children who meet the definition at 45 C.F.R. 121a.5 *et seq.* and 45 C.F.R. 84.3(j).

IV. LEAST RESTRICTIVE ALTERNATIVE

1. From the time of referral for evaluation until appropriate placement is made, including any time necessary to complete due process procedures for children in the Hartford School District, the defendants shall ensure that:

(a) The child shall remain in the placement current at the time of referral for evaluation and shall be subject to protection against repeated suspension and expulsion as set forth in Section VIII; unless,

(b) the child, or his or her parents agree in writing with the Hartford School defendants that the child be placed in an appropriate alternative temporary placement with appropriate supportive and related services as set forth at 45 C.F.R. §§ 121a.13, 121a.4 until such time as fully appropriate placement is achieved (*see* Section VII). Such alternative placement shall be the least restrictive environment setting which most closely approximates the appropriate setting the child needs.

(c) In no event shall any child referred for evaluation be placed at any time, on either a temporary or permanent basis, in a program of homebound or hospitalized instruction, *i.e.*, in any educational program which is conducted on a one to one small group basis in the home or hospital room unless the following procedure is followed and documented in writing:

(1) A physician, after physical examination, has certified in writing that the child is unable to attend school for specific and temporary medical reasons and has stated the expected date the child will be able to return to the school program, *i.e.*, current placement at the time of referral, agreed upon interim placement as stated above, or fully appropriate program. Temporary and specific medical reasons shall be limited to illness or other temporary disabling conditions which do not fall within the description of handicapping conditions set forth at 45 C.F.R. § 121a.5.

(2) Except for medical reasons as described in § 1(c)(1) above, students may be placed in homebound instruction only if the student is awaiting completion of a PAT or initation of an appropriate placement recommended by a PAT or if the student presents a substantial threat to the health or safety of others and the following procedures are followed:

(a) The student must first be placed in the least restrictive educational setting which most closely approximates the appropriate educational setting which the student needs (*see* Section 1(b) above). Prior to this placement, a PAT must be convened to formulate an IEP and identify the appropriate educational placement. This PAT may not consider the alternative of homebound instruction.

(b) If the alternative placement described in § (2)(a) above fails to meet the student's needs and if the student continues to present a substantial threat to self or others, then a new PAT may be convened. This PAT may consider any alternative placement for the student, including homebound instruction. However, no student may be placed in homebound instruction unless a PAT has been held and an IEP written prior to placement. However, in no event shall a student in these circumstances be placed in home instruction for longer than ten days.

(c) At the end of the ten day period of home instruction, a new PAT shall be convened to consider whether the child should be placed in a new educational setting or continued in homebound instruction. However, the timelines for placement required by Section VII of this decree shall run from the date of the first PAT held after referral for evaluation.

(3) Homebound instruction shall be provided as follows:

(a) instruction shall begin within one week.

(b) where instruction has been provided by a special education teacher in school, such instruction shall be provided only by teachers certified in special education when the child is on home instruction.

(c) instruction shall be provided for at least two hours a day or ten hours per week per child, unless or until such time as state statute or regulation provides minimum standards for hours of homebound instruction, at which time counsel will meet to attempt to resolve the modification, subject to the Dispute Resolution Section XII.

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(4) In no event shall any child referred for evaluation be placed in any alternative learning center, alternative education program or any other equivalent part time small group setting outside of mainstream school unless a duly constituted Pupil Appraisal Team meeting (hereinafter PAT) recommends such placement in writing, havng considered less restrictive alternatives, and having completed prior to such placement an individualized education program as described in federal law, or, in the case of placement in the diagnostic center, an individualized diagnostic plan.

(a) pending placement in such an alternative learning center as more fully described above, the child shall remain in his or her current placement effective at the time of referral, and shall be subject to protection from repeated suspension and expulsion as provided for in Section VIII.
(b) where placement is made at an alternative learning center, instruction shall be provided as follows:

(1) instruction shall be by teachers or staff certified to teach special education or to provide supportive and related services pursuant to state and federal law requirements for certification, as specified in the individualized education program.
(2) instruction shall be provided for at least four hours a day for twenty hours a week per child, unless an individualized education program provides for fewer hours of instruction.

2. Upon the finding of a duly constituted PAT that any child is in need of residential placement due to his or her handicapping condition and need for special education the obligation and sole responsibility for placement and payment of cost for such placement resides with the Hartford school defendants, subject to applicable reimbursement by the State defendants. Such handicapping conditions which may, due to their severity, demonstrate a need for residential placement include: hardness of hearing, deafness, speech impairment, visual handicap, mental retardation, serious emotional disturbance, orthopedic or other health impairment and specific learning disability, or any physical or mental impairment which substantially limits learning. Such placement shall occur within the timelines set forth at Section VII and in accordance with the IEP prepared in accordance with Section VI.

V.
PROCEDURAL PROTECTIONS

1. The Hartford school defendants shall comply with all procedural protections specified at 20 U.S.C. § 1415 and 45 C.F.R. § 121a.500-121a.575.

2. The Hartford school defendants may use the SST process to determine whether to refer a student for an evaluation. The student, the students' parent or any professional employee of the defendant may request that an SST meeting be convened. No SST meeting may be convened without a parent's presence unless the Hartford school defendant can document that it has made efforts to involve parents pursuant to 45 C.F.R. § 121a.343. No SST meeting shall sit, however, as an IEP meeting as described in 45 C.F.R. § 121a.340-121a.349. All procedural and substantive protections available under State and federal law concerning the education of handicapped children shall be available during the SST process.

3. The issue of the Hartford school defendant's continued use of the Central Pupil Appraisal Team (hereinafter CPAT) as it presently exists has been referred to the court for a declaratory ruling.

VI.
INDIVIDUALIZED EDUCATIONAL PROGRAMS

A.

The Hartford school defendants will provide individualized educational programs (IEPs) for all handicapped students who are enrolled or reside in the Hartford Public School District according to the standards and procedures set forth at 20 U.S.C. § 1401(19) and 45 C.F.R. §§ 121a.307, 121a.340-121a.349.

1. Each IEP formulated by the Hartford School defendants will be a full and complete IEP according to the definition set forth at 45 C.F.R. § 121a.346.

(a) The Hartford school defendants will ensure that each meeting to draft IEPs includes the following participants, pursuant to 45 C.F.R. 121a.344:

(1) A representative of the local educational agency other than the child's teacher who is qualified to provide or supervise the provision of special education.
(2) The child's teacher.
(3) One or both of the child's parents, subject to § 121a.345.
(4) The child, where appropriate.
(5) Other individuals at the discretion of the parent or agency.

(b) For a handicapped child who has been evaluated for the first time, the Hartford school defendants shall insure:

(1) That a member of the evaluation team participates in the meeting, or
(2) That the representative of the local educational agency, the child's teacher, or some other person is present at the meeting, who is knowledgeable about the evaluation procedures used with the child and is familiar with the results of the evaluation.

(c) The Hartford school defendants shall take steps to insure that one or both of the parents of the handicapped child are present at each meeting or are afforded the

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opportunity to participate, pursuant to 45 C.F.R. 121a.345, including:

(1) Notifying parents of the meeting early enough to insure that they will have an opportunity to attend; and
(2) Scheduling the meeting at a mutually agreed on time and place.

(d) The notice under paragraph (a)(1) of this section must indicate the purpose, time, and location of the meeting, and who will be in attendance.
(e) If neither parent can attend, the local educational agency shall use other methods to insure parent participation, including individual or conference telephone calls.
(f) A meeting may be conducted without a parent in attendance if the local educational agency is unable to convince the parents that they should attend. In this case the local educational agency must have a record of its attempts to arrange a mutually agreed on time and place such as:

(1) Detailed records of telephone calls made or attempted and the results of those calls.
(2) Copies of any correspondence sent to the parents and any responses received, and
(3) Detailed records of visits made to the parent's home or place of employment and the results of those visits.

(g) The Hartford school defendants shall take whatever action is necessary to insure that the parent understands the proceedings at a meeting, including arranging for an interpreter for parents who are deaf or whose native language is other than English.
(h) The Hartford school defendants shall give the parent a copy of the individualized education program.
(i) The individualized education program for each child must include:

(1) A statement of the child's present levels of educational performance;
(2) A statement of annual goals, including short term instructional objectives;
(3) A statement of the specific special education and related services to be provided to the child, and the extent to which the child will be able to participate in regular educational programs;
(4) The projected dates for initiation of services and the anticipated duration of the services; and
(5) Appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis whether the short term instructional objectives are being achieved;
(6) A statement of appropriate disciplinary techniques, not to include suspension or expulsion, shall be included for those students determined to present special disciplinary problems by the P.A.T.

(j) Before the local educational agency places a handicapped child in a public or private facility, the agency shall initiate and conduct a meeting, pursuant to § 121a.347 to develop an individualized education program for the child in accordance with § 121a.343.
(k) The Hartford school defendants shall insure that a representative of the private school facility attends the meeting. If the representative cannot attend, the Hartford school defendants shall use other methods to insure participation by the private school or facility, including individual or conference telephone calls.
(l) The Hartford school defendants shall also develop an individualized educational program for each handicapped child who was placed in a private school or facility by the agency before the effective date of the regulations.
(m) After a handicapped child enters a private school or facility, any meeting to review and revise the child's individualized education program may be initiated and conducted by the private school or facility at the discretion of the Hartford school defendants.
(n) If the private school or facility initiates and conducts these meetings, the Hartford school defendants shall insure that the parents and an agency representative:

(1) Are involved in any decision about the child's individualized education program; and
(2) Agree to any proposed changes in the program before those changes are implemented.

(o) Even if a private school or facility implements a child's individualized education program, responsibility for compliance with this part remains with the local educational agency and the State educational agency, pursuant to 45 C.F.R. 121a.348.
(p) If a handicapped child is enrolled in a parochial or other private school and receives special education or related services from a public agency, the Hartford school defendants shall, pursuant to 45 C.F.R. 121a.348:

(1) Initiate and conduct meetings to develop, review, and revise an individualized education program for the child, in accordance with 45 C.F.R. § 121a.343; and
(2) Insure that a representative of the parochial or other private school attends each meeting. If the representative cannot attend, the Hartford school defendants shall use other methods to insure participation by the private school, including individual or conference telephone calls.

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VII.
TIMELINES FOR PLACEMENT

A.

Special education and related services shall be provided as soon as possible, but in any event shall be no later than the following timelines:

1. Academic Year—In the case of a referral made during the academic year, the timelines for the Hartford school defendants shall be as follows:

(a) Notice of Student Study Team meeting shall be sent to the parents within ten (10) days of the date of the Referral to Student Study Team. Said notices shall be as specified in Section XI.

(b) The evaluation study, whether performed in-district or contracted out, shall commence upon obtaining parental consent where such consent is necessary but shall be completed no later than thirty (30) days from the date of referral. In the event evaluation is not completed, parental consent shall be secured for an extension. Request for consent for extension shall include reasons why such extension is needed. Where not secured the PAT will be convened according to paragraph (c).

(c) The Pupil Appraisal Team meeting to develop, review or revise the individualized education program shall be held within fifteen (15) days of completing the evaluation.

(d) Notice of the Pupil Appraisal Team meeting to develop, review, or revise the child's individualized education program shall be sent to the parents at least five days prior to such meeting, said notice to be in accordance with Section XI.

(e) The individualized education program shall be written, or revised, in full and a copy sent to the parents within five (5) days after the Pupil Appraisal Team Meeting to develop, review or revise the individualized education program.*

(f) Where necessary, parental consent for placement shall be given within ten (10) days of the date of the copy of the individualized education program. Said consent for placement shall be as specified in Section XII. Failure of a parent to respond within ten (10) school days shall be construed as refusal to consent.

(g) The major components of the individualized education program shall be implemented within fifteen (15) school days of the writing of the individualized education program or within ten (10) school days of obtaining parental consent, where such consent is necessary.

(h) In the case of a child whose individualized educational program calls for private or out of district placement, within fifteen (15) days after the IEP is drafted the Hartford school defendants shall, if the child is not yet placed, request, and the State Department shall provide assistance in finding alternative placement options. In any case, the individualized education program shall be fully implemented within thirty (30) days of obtaining parental consent for placement. If the program is not fully implemented within that period, documentation shall be sent to the Commissioner of Education or his designee, with a copy to the parent and counsel, which demonstrates whatever good faith attempts to place have been made in the thirty day period. If any person disputes the failure to place, they may resort to the due process procedures set forth at 45 C.F.R. 121a.500 *et seq*.

2. Between Academic Years—In the case of a referral made in between academic years, the effective date of the referral may be deemed to be the first school day of the next academic year.

VIII.
DISCIPLINE

A.

For the purposes of this section, the definition of such terms as "removal," "suspension" and "expulsion" shall be those contained at § 10-233 Connecticut General Statutes, and the following procedures shall apply to the Hartford school defendants and to all children referred for evaluation from the date of such referral until such time as a duly constituted PAT recommends the discontinuation of any or all special education services and/or it finds that the subject child is not handicapped within the meaning of federal and state law, and is not in need of special education.

1. No identified handicapped child shall be removed more than six (6) times in any school year or more than twice in one week unless removal is an appropriate disciplinary measure contemplated and stated in the child's individual education program.

2.

(a) No child referred for evaluation or identified as in need of special education shall be suspended more than 15 days or expelled during the course of one school year without first following the procedure of convening a PAT as described in Section IV and VI, at which time the appropriateness of the child's placement will be evaluated.

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* The Hartford School defendants have indicated their intention to request a declaratory ruling from the Department of Health, Education and Welfare with regard to the time for development of short term objectives. At such time as a ruling is received, the Hartford School defendants reserve the right to resort to the dispute resolution procedures at Section XII. However, until such time as the dispute resolution procedure is completed, the specific short term instructional objectives shall be developed at a PAT at the time the individualized educational program is written with the parents' participation. (*See* Sections VI and VII.)

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(b) In the instance where the PAT identifies the child in need of special education, the special education administrative process as described herein and in state and federal law will replace the disciplinary process described in state law and Board policy.
(c) At no time shall any referred or identified child as described in this section be removed more than six (6) times in the school year or more than twice in one week, suspended for more than 15 days in any school year or expelled from school without first convening a PAT except where such a child is considered an imminent danger to the health and safety of the school, and emergency suspension is necessitated. In that instance, the suspension shall nonetheless be preceded by good faith attempts to contact the child's parent. In the case of any emergency suspension, a PAT shall be convened within one week for the purpose of evaluating the child's program.

3. The above shall apply to all children from the date of referral for evaluation, and shall include children placed in-district and in out-of-district programs, both public and private.

4. The defendants shall insure that the discipline policy as described herein is followed consistently for all children described, both in and out-of-district.

5. To ensure compliance with all the procedural protections and rights contained in federal and state law and applicable to all handicapped children placed out of the Hartford school district, the Hartford school defendants shall from the date of approval of this Consent Decree ensure that all contracts for payment to out-of-district facilities are drafted to include conditions requiring compliance with federal and state law concerning special education, and shall forward to all such facilities copies of pertinent policy statute or regulation pertaining to special education.

6. The Commissioner of Education or his designee shall circulate to all local educational agencies in Connecticut a letter informing the local agencies of the necessity to draft all contracts with out-of-district facilities to include conditions of compliance with federal and state law concerning education of the handicapped.

7. Any child who is not referred or identified, but who has been suspended more than 15 days in any school year, or is recommended for expulsion, or who has been expelled pursuant to the emergency procedures at Conn. Gen. Stat. § 10-233 shall be referred to an SST to determine whether that child should be evaluated and referred to a PAT, all in accordance with the timelines at Section VII. Where a child is determined to be handicapped and in need of special education the special education process will take place in lieu of the discipline process.

IX.
IDENTIFICATION OF FIRST PRIORITY CHILDREN

A.

Defendant Hartford school district shall, at least once each school year, review the performance of each student and where necessary, review the files and records of each student not previously identified as a student in need of special education of determine whether the student should be referred to a Student Study Team. In reviewing the performance of each student, consideration shall be given at a minimum to such factors as:

(a) Whether the student has ever been recommended to repeat a grade.
(b) Whether there is a significant discrepancy between the student's ability and his/her achievement.
(c) Whether there is any indication of any health or physical impairments.
(d) Whether the student has exhibited one or more of the following characteristics over a long period of time and to a marked degree, which adversely affects educational performance:

(1) An inability to learn which cannot be explained by intellectual, sensory, or health factors;
(2) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers;
(3) Inappropriate types of behavior or feelings under normal circumstances;
(4) A general pervasive mood of unhappiness or depression; or
(5) A tendency to develop physical symptoms or fears associated with personal or school problems.

(e) Whether the student has been truant for eleven days or more in any quarter or forty-five days or more in any school year.
(f) Whether the student has failed more than one course in a marking period.

B.

All parties agree that the State Board of Education is required to maintain an on-going Child Find program. As part of that effort, for the 1978-1979 school year, the State Department of Education will engage in the following:

1. State media effort in regard to Child Find week in the State of Connecticut, including radio, television, and newspaper announcements.

2. Mailing of letters, brochures, and literature to local educational agencies with regard to the Child Find.

3. Encouraging participation on the local level in Child Find week.

4. Maintain the toll free telephone line for parents with regard to special education and Child Find week.

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C. Distribution

1. Within ten (10) days of the approval of this Consent Decree, copies of the Decree will be distributed by the Hartford school defendants to the following:

(a) All local and state defendants; including members of the Board of Education, the Superintendent of the Hartford school system, and the Commissioners of Education and the Department of Children and Youth Services.
(b) All administrative and professional employees of the Division of Pupil Personnel and Instructional Support Services of the Hartford Public Schools.
(c) Members of the Program Review team of the Connecticut Department of Education.
(d) Responsible officials at each and every out-of-district facility to which a named plaintiff is referred or where a named plaintiff is currently placed.
(e) Corporation Counsel's office.
(f) The Court Expert.

X.
STATE DEPARTMENT OF EDUCATION RESPONSIBILITY

Within twenty (20) days of the approval of this Consent Decree the defendant Secretary of the Connecticut State Department of Education shall complete a full review which shall include both Compliance and Program review components of the provision of special education by the Hartford school defendants. Such Review shall include specific timelines toward completion within forty-five (45) school days from the approval of the Consent Decree.

1. Such compliance and program review shall include:

(a) Collection of data and reports.
(b) Conduct of on-site visits.
(c) Comparison of sampling of individualized education programs with the programs actually provided.
(d) Involvement of parents in monitoring activities as prescribed in Appendix D of the State Department of Education Annual Program Plan.
(e) Review of the progress and accomplishment of programs and services for children requiring special education including but not limited to curriculum, conditions of instruction, physical facilities and equipment, class composition and size, admission of students, and the requirements respecting necessary special services and instruction as required by § 10-76b of the Connecticut General Statutes.

2. The Review shall with regard to the named plaintiffs be conducted in conjunction with the Court Expert, who shall have access to all information gathered in the course of the review and shall be provided with a copy of the final review report to be completed within forty-five (45) school days of initiation of the review. Specific recommendations for change in regard to the named plaintiffs which result from the review will be discussed with the Court Expert and implemented under his responsibility.

3. The Review shall be conducted in accordance with the specific terms and instruments described and attached at Appendix D of the State Department of Education Annual Program Plan submitted to the Department of Health, Education, and Welfare for fiscal year 1979.

4. In particular, the Commissioner of Education of the State of Connecticut or his designee shall undertake monitoring to insure that the Hartford Public School District develops and implements an individualized educational program (IEP) for each of the named plaintiffs enrolled in or residing in the Hartford Public School District.

5. The Commissioner of Education of the State of Connecticut shall insure that each of the named plaintiffs who is placed in or referred to an out of district school or facility has an individualized educational program prepared in accordance with federal regulation set out at 45 C.F.R. § 121a.349, 45 C.F.R. § 121a.2(c), and 45 C.F.R. § 84.33 and § 84.39.

6. The defendant Commissioner of Education or his designee shall monitor the special education placements of each of the named plaintiffs both within the Hartford school district and all referrals and placements of named plaintiffs to out-of-district placements to insure that a completed individualized education program is prepared before placement and is implemented.

7. The defendant Commissioner of Education or his designee shall insure that the provisions of paragraphs 4, 5 and 6 are completed at the point when the final Review report is completed.

8. The Review as conducted by the State Education defendants shall highlight particular areas of concern to the named plaintiffs, including:

(a) The certification of all instructional personnel in the Alternative Education Center or homebound instruction program;
(b) The hours of instruction received by students enrolled in Alternative Education Centers or homebound instruction programs;
(c) The preparation of individualized educational programs for students enrolled in Alternative Education Centers or homebound instruction program;
(d) The preparation of, and participation of the Hartford school defendants and parents in individualized educational programs for out of district placements;
(e) The provision of appropriate notice to parents, contained and documented in student file records, of their rights under federal and state law pertaining to special education;
(f) The provision of culturally, linguistically and racially nonbiased testing and evaluation materials, and the use of testing and evaluation materials and methods, which do not discriminate on the basis of handicap.
(g) The review of student records shall consist of a review of a stratified random sample of a total of 65 students. This review shall consist of file reviews, parent interviews, and program audits. The sample shall be compiled through a stratification which shall be based on in-district or out-of-district placement. Should the

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random sample not include a sufficient representation of black and hispanic students the sample will be redrawn to include that representation.

9. Any information or report of noncompliance in the highlight areas listed above at paragraph 8 shall be incorporated in the final review report and dealt with in the same manner as other areas of noncompliance found in the Review.

XI.
STANDARD FORMS

A.

The following forms having been developed by all parties shall be used and disseminated throughout the Hartford Public School System, and are considered to be external forms in that they are designed to impart information to parents. They are to be prepared in translation and sent in the dominant language of the parent. These forms are to be supplemented by internal documents, including but not limited to a form for documenting parental contacts [Section VL A A 1)(f) and Section V 2)] and a form for documenting good faith attempts to place [see Section VII A 1)(h), (i)].

B.

The forms attached are to be completed and sent in accordance with the Timelines at Section VII.

1. Referral to Student Study Team

(a) This form is to be filled out when an initial referral is made by a classroom teacher or other local school personnel, and after completion is to be sent to the parent with the Notice of Student Study Team meeting.

2. Request for Consent for Assessment

(a) On an initial referral, this form is to be completed and sent to the parent by the Student Study Team with a copy of the Notice of Free and Appropriate Education.

3. Request for Extension of Evaluation

4. Notice of Free and Appropriate Education

5.
(a) Notice of Student Study Team Meeting
(b) Notice of Pupil Appraisal Team Meeting
(c) Notice of Pupil Appraisal Team Meeting (REVIEW)

6. Individualized Educational Program

C.

Whenever a child has been identified as handicapped and is receiving a special education program or services, but that program is to be reviewed, the Hartford defendants shall convene a Pupil Appraisal Team meeting in the manner set forth at Section VII A 1) (b) through (i) and shall use forms 3, 4, 5(c) and 6 above as appropriate.

XII.
DISPUTE RESOLUTION

1. Any disputes regarding the implementation of the terms of the Consent Decree as policy and practice throughout the Hartford School System shall be resolved as follows:

(a) Counsel for all parties shall meet on a monthly basis from approval of this Decree, with previously agreed upon agendas, to attempt to resolve any differences. Subject to prior approval of counsel, any counsel may bring other individuals to the meetings.
(b) If counsel are unable to resolve any matter, the dispute shall be presented to the Court or, subject to the agreement of the parties, the United States Magistrate.
(c) Individual complaints with regard to the appropriateness of a particular program, evaluation or placement which do not involve district wide policy or practice shall be resolved through the due process procedures at 45 C.F.R. 121a.500 *et seq*.

The Court retains jurisdiction of this action for all purposes, including the entry of such additional orders as it deems just, necessary or proper. However, following a final report to the Court by the parties and the Court Expert on July 1, 1980, concerning implementation of this decree, the Court may choose to enter a final order in this case.

The parties, by this Consent Decree, and through their attorneys, hereby consent to the entry of this Order.

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CHRISTIAN STANLEY, by and through his mother and next friend, LINDA STANLEY,
Plaintiff

v.

School Administrative Unit No. 40 for Milford — Mont Vernon, New Hampshire, *et al.*,
Defendants

No. 80-9-D

United States District Court for the District of New Hampshire

January 15, 1980

O'Connell, District Judge

On motion for declaratory and injunctive relief to prevent LEA from suspending learning disabled, but not emotionally disturbed, child. During first year in high school, child was referred to regional special education consortium, but during that year was suspended six times — once for use of profanity, the balance for failure to come to detention. Prior to the last of these suspensions, the child's parent was notified that the school board would hold a hearing and that parent had a right to have counsel present. The school board suspended the child for 21 days "for neglect or refusal to conform to he reasonable [rules] of" the high school and directed that the child be re-evaluated as soon as practicably possible.

HELD, motion for preliminary injunction denied in most respects. Child is unlikely to succeed in his claim that the suspension constitutes a discrimination on the basis of his handicap. Evidence indicates that child's disruptive behavior was not caused to any substantial degree by his handicap or by his current placement program, but rather by serious family problems. Moreover, although the suspension involved is longer than that considered in *Goss v. Lopez*, 419 U.S. 565 (1975), more elaborate procedural safeguards than are required by *Goss* were afforded and it is unlikely that they will be found procedurally defective. Finally, since the suspension cannot be said to be discriminatory because the child's behavior has not been shown to be substantially related to the child's handicap or the LEA's attempts to remedy that handicap, the unequal treatment that is the hallmark of equal protection analysis under any standard is here not sufficiently evident to predict success on the merits of this claim.

ORDER AND OPINION

Plaintiff Christian Stanley, a fifteen-year-old tenth grade student at the Milford (New Hampshire) Area Senior High School, brings this 42 U.S.C. § 1983 action seeking declaratory and injunctive relief from defendants' suspending him from school for twenty-one days.[1] Such action is alleged to violate rights guaranteed by the Education for All Handicapped Children Act (20 U.S.C. § 1401, *et seq.*), § 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794), and the Fourteenth Amendment to the Constitution of the United States. Of concern here is plaintiff's motion for a temporary restraining order filed January 7, 1980. Hearing thereon was held before the Court on January 11, 1980, at which time counsel for both sides appeared ready to introduce the testimony of witnesses and relevant exhibits. In this light, and as counsel agreed that the case was ripe at this juncture for determination of whether preliminary injunctive relief should issue, the Court has proceeded on that basis. 11 Wright & Miller, Federal Practice and Procedure § 2951, at 499, 500.

From the testimony of Ray Yarmac, a psychotherapist employed by the Nashua Youth Council who has been counseling plaintiff since August of 1979, it appears that plaintiff has had a long history of academic failure. As revealed by his mother, plaintiff was at one time enrolled in a private school in Lake Placid, New York, where he managed to pass each grade, but with low average work. In his first year (1978-1979) at the Milford Area Senior High School, however, plaintiff failed to pass and was thereafter referred to the Regional Special Education Consortium (serving School Administrative Unit 40) by the school's Pupil Placement Team for purposes of testing and evaluation. As reported by John O. Willis, Director of Psychoeducational Services for the Consortium, this testing of plaintiff revealed "[a] discrepancy between roughly Average intellectual potential and

[1] Christian Stanley will generally be referred to hereinafter as the plaintiff, although the action was brought "by and through his mother and next friend, Linda Stanley." Also, to be consistent with plaintiff's usage at hearing, "defendants" will for purposes of this Order refer only to the Milford School Board — the entity that issued the challenged decision to suspend plaintiff.

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Below Average reading and Low writing caused by a vocabulary weakness" that in Willis' opinion constituted a "learning disability." (*See* Plaintiff's Exhibit 4 at 4.) Responding to this evaluation, the Pupil Placement Team formulated for plaintiff an Individualized Education Program (or Plan) and prepared a Statement of Placement for the school year 1979-1980 which contemplated that Chris would receive five hours per week of specialized instruction in the school's "resource room" in addition to spending twenty-five hours in his regular classrooms. Plaintiff's mother consented to such placement. (*See* Plaintiff's Exhibit #1.)

As of early October 1979, the above placement appeared to be having good effects. Indeed, plaintiff's mother testified that with one notable exception she received at that time a "glowing" report from plaintiff's teachers as to the plan's success.[2] By the middle of that month, however, plaintiff began to pose disciplinary problems for the school.[3] On a sometimes daily basis, plaintiff reported to school tardy. (*See* Defendants' Exhibit A.) As revealed in the testimony of school principal Ronald Berry, school rules, about which plaintiff was informed both orally and in writing (*see* Defendants' Exhibit B), require that a tardy student first report to the office to receive a pass that would enable him to enter his classroom late. Principal Berry noted that such continually late entrances into classes had a disruptive influence. Moreover, Berry and Assistant Principal David Dube related several incidents, admitted to by plaintiff himself, where plaintiff used profanity to teachers in the presence of other students when requested to quit talking in study hall, to report to class or to the school office, or to perform certain study tasks. On one such occasion, Principal Berry himself removed plaintiff from class to take him to his office. On another, Assistant Principal Dube found plaintiff wandering in the halls and had to follow him into the men's room before finally persuading him to report to the office.[4]

As summarized in Plaintiff's Exhibit 3, plaintiff was actually suspended on six occasions between October 17 and December 12, 1979 — five times for failure to come to detention (*see* Defendants' Exhibit B) and once for his use of profanity. Each of these suspensions was served at school as "internal" suspensions (*id.*) and are not here in question. Apparently prior to the last of these suspensions, School Superintendent Julius D'Agostino notified plaintiff's mother that a hearing was to be held on these disciplinary problems before the Milford School Board and that she had a right to have counsel present. Such hearing was held on December 19, 1979, at which time plaintiff appeared and was represented by counsel. After considering the testimony and exhibits presented at that hearing, the Board on January 2, 1980, sent to plaintiff's parents a letter informing them of its findings of fact and decision based thereon. (Defendants' Exhibit C.) In addition to recounting plaintiff's record of disciplinary problems during the 1979-80 school year and his current poor academic performance, the Board noted that there was no evidence that plaintiff (although "educationally handicapped") was "emotionally handicapped" and concluded that

> the discipline infractions by Christian Stanley, particularly the insubordination, profanity and [belligerent] behavior [toward] teachers, was in fact disruptive to the educational environment of the school and particularly to the students who witnessed the discipline offenses recorded in Exhibit #1. The Milford School Board does not and will not condone such behavior by any student, even a student who is educationally handicapped and identified as a slow learner.

(*Id.*, finding #5.)[5] In this light, the Board ruled that:

> 1. Christian Stanley is suspended from the Milford Area Senior High School, Milford, New Hampshire, for 21 school days, beginning on Friday, January 4, 1980, and continuing to and including Friday, February 1, 1980, for neglect or refusal to conform to the reasonable [rules] of the Milford Area Senior High School.
> 2. The Milford School Board directs that Christian Stanley be reevaluated by the Pupil Personnel Team as soon as practicably possible. This reevaluation is to include the discipline infractions occasioned by Christian Stanley during the 1979-80 school year. If the Pupil Personnel Team determines that the current placement is not presently appropriate, the Team is directed to determine a new IEP and Placement for Christian Stanley.

Plaintiff has not in fact attended school since January 4, 1980, nor has he to date received any home tutoring. Since that time, however, the aforementioned Regional Special Education Consortium has conducted further psychological testing of plaintiff and has begun to formulate plans for a new

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[2] That exception was for American Government, for which plaintiff's mother was informed

> Chris displays an immature attitude toward his responsibilities in that he does not take advantage of the time he has in class to complete work or to participate in assignments. He presents no major discipline problem but he is directly cheating himself. He has attempted no homework or class participation.

(Plaintiff's Exhibit #2.) Plaintiff's mother was also notified by his Resource Room teacher that "Chris has a low average due to incomplete homework assignments and 3 absences which he hasn't made up . . ." (*Id.*)

[3] From the testimony at hearing of psychotherapist Yarmac, it appears that this development coincided to some extent with increasing problems in plaintiff's family within the last few months.

[4] As reported in plaintiff's discipline record (Defendants' Exhibit A), plaintiff was thrown out of one class on December 18, 1979, for "throwing spitballs."

[5] At an earlier point in its findings, the Board noted its concern "with the fact that most of these infractions were deliberate and appear to have been calculated." (Defendants' Exhibit C, finding #1.)

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"placement" for him.* Indeed, Consortium members had been involved in discussions to that end with plaintiff's mother on the Wednesday and Thursday prior to the hearing before this Court. The consensus of the Consortium at this time is as follows: While plaintiff is not emotionally handicapped, it appears that he cannot comply with the rules of his regular school and thus it is not in his best interest to remain there. Alternative nonresidential placement in "Project Clearaway" in Nashua is recommended and, if approved by all parties, could be commenced almost immediately. In the meantime, the Consortium has been contacting individuals to arrange for home tutoring of plaintiff, if necessary.

The essential factors to be considered in determining the appropriateness of preliminary injunctive relief are: (1) the significance of the threat of irreparable harm to plaintiff if such relief is not granted; (2) the balance between such harm and the injury that injunctive relief would inflict on defendants; (3) the probability of plaintiff's success on the merits; and (4) the public interest. 11 Wright & Miller, Federal Practice and Procedure § 2948, at 430, 431; *Automatic Radio Manufacturing Co. v. Ford Motor Co.*, 390 F.2d 113 (1st Cir. 1968); *Sec. & Exchange Commission v. World Radio Mission, Inc.*, 544 F.2d 535 (1st Cir. 1976); *Interco, Inc. v. First National Bank of Boston*, 560 F.2d 480 (1st Cir. 1977); *Grimard v. Carlston*, 567 F.2d 1171 (1st Cir. 1978).

Turning first to the third of the above four factors, it is to be recalled that plaintiff challenges his suspension on both statutory and constitutional grounds. As to the Education for All Handicapped Children Act of 1975, 20 U.S.C. § 1401, *et seq.*, one commentator has recently noted

> Congress passed [the Act] in response to the need for increased funding brought about by the widespread recognition by courts and State legislatures of the right of handicapped children to an adequate education. Although the Act sets forth general requirements States must meet in order to qualify for receipt of Federal funds, it does not prescribe the specific educational programs local schools must make available in order to fulfill those requirements. Instead, the heart of the Federal control mechanism is a system of procedural safeguards which provides for parental involvement in educational placement decisions. In effect, the Act guarantees procedures whereby parents may challenge the appropriateness of their child's educational program, but provides only the most general guidelines for resolving the substantive questions such challenges may present.

Note, Enforcing the Right to an "Appropriate" Education: The Education for All Handicapped Children Act of 1975, 92 Harv. L.Rev. 1103, 1103 (1979) (footnotes omitted). In particular, 20 U.S.C. § 1412 Eligibility Requirements provides that

> In order to qualify for assistance under this subchapter in any fiscal year, a State shall demonstrate to the Commissioner that the following conditions are met:
>
> (1) The State has in effect a policy that assures all handicapped children the right to a free appropriate public education.
>
> . . .
>
> (5) The State has established (A) procedural safeguards as required by section 1415 of this title, (B) procedures to assure that to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and that special classes, separate schooling, or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily
>
> . . .

And 20 U.S.C. § 1415 Procedural Safeguards provides that:

> (a) Any State educational agency, any local educational agency, and any intermediate educational unit which receives assistance under this subchapter shall establish and maintain procedures in accordance with subsection (b) through subsection (e) of this section to assure that handicapped children and their parents or guardians are guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies and units.
>
> (b)(1) The procedures required by this section shall include, but shall not be limited to —
>
> . . . .
>
> (C) written prior notice to the parents or guardian of the child whenever such agency or unit —
>
> (i) proposes to initiate or change,
>
> . . .
>
> the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child;
>
> . . . .
>
> (E) an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educa-

* According to the testimony of Philip Boucher, Director of the Consortium, its staff had once again been involved with plaintiff on a counseling basis since October of 1979. The Consortium apparently has presently been given preliminary authority by plaintiff's mother to seek the new placement.

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tional placement of the child, or the provision of a free appropriate public education to such child.

(2) Whenever a complaint has been received under paragraph (1) of this subsection, the parents or guardian shall have an opportunity for an impartial due process hearing which shall be conducted by the State educational agency or by the local educational agency or intermediate educational unit, as determined by State law or by the State educational agency. No hearing conducted pursuant to the requirements of this paragraph shall be conducted by an employee of such agency or unit involved in the education or care of the child.

(c) If the hearing required in paragraph (2) of subsection (b) of this section is conducted by a local educational agency or an intermediate educational unit, any party aggrieved by the findings and decision rendered in such a hearing may appeal to the State educational agency which shall conduct an impartial review of such hearing. The officer conducting such review shall make an independent decision upon completion of such review.

. . . .

(e)(1) A decision made in a hearing conducted pursuant to paragraph (2) of subsection (b) of this section shall be final, except that any party involved in such hearing may appeal such decision under the provisions of subsection (c) and paragraph (2) of this subsection. A decision made under subsection (c) of this section shall be final, except that any party may bring an action under paragraph (2) of this subsection.

(2) Any party aggrieved by the findings and decision made under subsection (b) of this section who does not have the right to an appeal under subsection (c) of this section, and any party aggrieved by the findings and decision under subsection (c) of this section, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction, or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence of the request of a party, and basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

(3) During the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents or guardian, be placed in the public school program until all such proceedings have been completed.

(4) The district courts of the United States shall have jurisdiction of actions brought under this subsection without regard to the amount in controversy.

Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794) states that:

> No otherwise qualified handicapped individual in the United States, as defined in Section 706(6) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.[7]

The thrust of plaintiff's claims under the above statutes is (1) that defendants' suspension of plaintiff constitutes a change in his placement which required them to follow the above-prescribed procedural safeguards prior to such change and (2) that in suspending plaintiff they have discriminated against him on the basis of his handicap by excluding him from the free appropriate public education afforded non-handicapped individuals. Aid in determining the likelihood of success of these claims, especially as to the procedural safeguards question, is provided by the now-effective regulations promulgated under these statutes by the Secretary of the Department of Health, Education, and Welfare (45 CFR § 84.1, *et seq.*) and the Commissioner of the Office of Education (45 CFR § 121a.1, *et seq.*).[8] As explained in Appendix A — Analysis of Final Regulation (45 CFR Part 121A) under Part B of the Education of the Handicapped Act, "Subpart D [*i.e.*, 45 CFR §§ 84.31 - 84.39] of the Section 504 . . . contains requirements very similar to those in Part B of the Education of the Handicapped Act." Indeed, explicit cross references between these regulations are included in two sections that are among those sections which are of assistance here: 45 CFR § 121a.552 and 45 CFR § 84.36.[9]

Of particular interest here are the terms of 45 CFR § 121a.513 Child's status during proceedings, which states that:

> (a) During the pendency of any administrative or judicial proceeding regarding a complaint, unless the public agency and the parents of the child agree otherwise, the child

[7] For purposes of this motion, defendants do not contest, and thus the Court does not address here, whether plaintiff is a "handicapped" individual within the coverage of these statutes or plaintiff's right to bring this action under them.

[8] All citations to these regulations will be to the 1978 versions thereof.

[9] Note from the language of § 84.36 that compliance with the procedural safeguards of 20 U.S.C. § 1416 (and its regulations) would appear to satisfy at least procedurally the mandates of 29 U.S.C. § 794.

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involved in the complaint must remain in his or her present educational placement.

. . . .

(20) U.S.C. § 1415(e)(3)

Comment. Section 121a.513 does not permit a child's placement to be [changed] during a complaint proceeding, unless the parents and agency agree otherwise. *While the placement may not be changed, this does not preclude the agency from using its normal procedures for dealing with children who are endangering themselves or others.*

(Emphasis added.) As to the meaning of the above-emphasized language, discussion of § 121a.513 in Appendix A, *supra*, at 526, is illuminating:

Comment. Commenters suggested a provision be added to allow change of placement for health or safety reasons. One commenter requested that the regulations indicate that suspension not be considered a change in placement. Another commenter wanted more specificity to make it clear that where an initial placement is involved, the child be placed in the regular education program or if the parents agree, in an interim special placement.

Response: A comment has been added to make it clear that *this section would not preclude a public agency from using its regular procedures for dealing with emergencies.*

(Emphasis added.) Of further assistance as to the procedural question raised herein is 45 CFR § 121a.552, which provides that:

Each public agency shall insure that:

. . . .

(c) Unless a handicapped child's individualized education program requires some other arrangement, the child is educated in the school which he or she would attend if not handicapped; and

(d) In selecting the least restrictive environment, consideration is given to any potential harmful effect on the child or on the quality of services which he or she needs.

(20 U.S.C. § 1412(d)(5))

Comment. Section 121a.522 includes some of the main factors which must be considered in determining the extent to which a handicapped child can be educated with children who are not handicapped. The overriding rule in this section is that placement decisions must be made on an individual basis. The section also requires each agency to have various alternative placements available in order to insure that each handicapped child receives an education which is appropriate to his or her individual needs.

The analysis of the regulations for Section 504 of the Rehabilitation Act of 1973 (45 CFR Part 84 — Appendix, Paragraph 24) includes several points regarding educational placements of handicapped children which are pertinent to this section . . .

The "Paragraph 24" referred to above provides as follows:

Section 84.34 [regarding educational setting] prescribes standards for educating handicapped persons with nonhandicapped persons to the maximum extent appropriate to the needs of the handicapped person in question. A handicapped student may be removed from the regular educational setting only where the recipient can show that the needs of the student would, on balance, be served by placement in another setting.

Although under § 84.34, the needs of the handicapped person are determinative as to proper placement, *it should be stressed that, where a handicapped student is so disruptive in a regular classroom that the education of other students is significantly impaired, the needs of the handicapped child cannot be met in that environment.* Therefore, regular placement would not be appropriate to his or her needs and would not be required by § 84.34.

(Emphasis added.)

The propriety of applying the procedural safeguards set forth in the above statutes and accompanying regulations was at issue in the case of *Stuart v. Nappi*, 443 F. Supp. 1235 (D CT 1978), wherein the Court was asked to determine whether 20 U.S.C. § 1415(e)(3) prohibited the expulsion of handicapped children during the pendency of a special education complaint. (*Id.* at 1241.) Finding that "[a]n expulsion has the effect not only of changing a student's placement, but also of restricting the availability of alternative placements" (*id.* at 1242-43), the Court held that "the Handicapped Act establishes procedures which replace expulsion as a means of removing handicapped children from school if they become disruptive." (*Id.* at 1242.) However, in light of the above regulatory provisions allowing the use of regular procedures in emergency cases, the Court went on to comment that

> school authorities can deal with emergencies by suspending handicapped children. Suspension will permit the child to remain in his or her present placement, but will allow schools in Connecticut to exclude a student for up to ten consecutive school days.

Id. at 1242. *Accord, Mrs. A.J. v. Special School District No. 1*, 478 F. Supp. 418, 432, n. 13 (D MN 1979). Moreover, the Court declared that

> Handicapped children are neither immune from a school's disciplinary process nor are they entitled to participate in programs when their behavior impairs the education of other children in the program. First, school authorities can take swift disciplinary measures.

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> such as suspension, against disruptive handicapped children. Secondly, a PPT can request a change in the placement of handicapped children who have demonstrated that their present placement is inappropriate by disrupting the education of other children. The Handicapped Act thereby affords schools with both short-term and long-term methods of dealing with handicapped children who are behavioral problems.

Stuart, supra, 443 F. Supp. at 1243.

The Court concurs with the Courts in *Stuart and Mrs. A.J.* that the temporary disciplinary measure of suspending a handicapped student for no more than ten consecutive school days would not constitute a change in that student's placement that would require adherence to the procedural safeguards governing removal under either 20 U.S.C. § 1401, *et seq.* or 29 U.S.C. § 794. However, it is to be noted that the suspension imposed on plaintiff here is for 21 consecutive school days, a length of time of such consequence that it may only be imposed with the approval of the Milford School Board itself. (*See* Defendants' Exhibit D.) In light of the impact, to be later discussed, that such a lengthy suspension may have upon plaintiff's disability, it may well be that such suspension (if permitted to run its full course) would in fact represent a change in his placement for which defendants are charged to provide procedural safeguards as a condition to their acceptance of Federal funds.

By contrast, however, the Court is unable to conclude that it is likely that plaintiff will succeed on his substantive statutory claim that his suspension constitutes a discrimination on the basis of his handicap. From the letter of the Milford School Board to plaintiff's parents informing them of its decision to suspend (Defendants' Exhibit C), it is clear that such measure was taken in response to the serious disciplinary problem plaintiff has posed for the school primarily since the middle of October of 1979. Testimony before this Court has been to the effect that there have been serious family problems in plaintiff's home beginning around that time. For the first month and a half of the school year when such family problems were evidently not so severe, plaintiff's academic performance had begun to improve due to implementation of a program including working in a special education classroom. On this basis, the Court cannot conclude at this juncture that the disruptive behavior that prompted the School board's suspension of plaintiff was caused to any substantial degree by his handicap or by his current placement program. *Cf. Stuart v. Nappi, supra*, 443 F. Supp. at 1241.

Having concluded that plaintiff is likely to succeed on the merits of his statutory claims only if his suspension is allowed to run its full 21-school-day course, we turn now to the likely merits of plaintiff's constitutional claim. Under *Goss v. Lopez*, 419 U.S. 565 (1975), the United States Supreme Court held that:

> Students facing temporary suspension have interests qualifying for protection of the Due Process Clause, and due process requires, in connection with a suspension of 10 days or less, that the student be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story. The Clause requires at least these rudimentary precautions against unfair or mistaken findings of misconduct and arbitrary exclusion from school.

Id. at 581. In the case at bar, a longer suspension than in *Goss* is involved; however, more elaborate procedural safeguards than are required by *Goss* were afforded plaintiff. The Superintendent of Schools notified plaintiff's mother in advance of the December 19th hearing, at which plaintiff was permitted to be represented by counsel in the examination of witnesses and exhibits against him. As to this portion of plaintiff's constitutional claim, then, the Court cannot conclude that it is likely that such safeguards will be found procedurally defective. Plaintiff argues, however, that "for purposes of due process, there must be a correlation between the offense and the penalty" (plaintiff's memo at 13) and further that defendants cannot dismiss plaintiff from school if that dismissal is not rationally related to the provision of plaintiff's special educational needs (*id.* at 15). As to the first of these contentions, the Court in *Lee v. Macon County Board of Education*, 490 F.2d 458, 460, n. 3 (5th Cir. 1978), noted as follows:

> In the landmark case of *Dixon v. Alabama State Board of Education*, 294 F.2d 150, 157 (CA5, 1961), this court wrote the following:
>
> "Turning then to the nature of the governmental power to expel the plaintiffs, it must be conceded . . . that that power is not unlimited and cannot be arbitrarily exercised. Admittedly, there must be some reasonable and constitutional grounds for expulsion or the courts would have a duty to require reinstatement."
>
> This passage and the constitutional provision it elaborates do not license Federal judges to review and revise school board disciplinary actions at will. *Application is limited to the rare case where there is shocking disparity between offense and penalty.*

(Emphasis added.) On the basis of the record as it presently stands, the Court cannot say that there is a shocking disparity between the offenses which prompted plaintiff's suspension and the penalty meted out therefore.[10] In support of the second above proposition, plaintiff cites cases involving challenges on equal protection grounds to programs currently provided for handicapped children, wherein motions to dismiss were denied on the basis that a stricter than minimum rationality standard of review might be appropriate. *See Fialkowski v. Shapp*, 405 F. Supp. 946, 957-59 (ED PA 1975); *Frederick L. v. Thomas*, 408 F. Supp. 832, 835-36 (ED PA 1976) (*later opinion aff'd in* 559 F.2d 373 [3rd Cir.

[10] In line with earlier discussion, it cannot be said at this juncture that plaintiff is being punished on account of his learning disability as his recent disruptive behavior appears to have stemmed primarily from family difficulties.

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1977]). Even under those standards it must be noted, as discussed earlier, that the School Board's suspension of plaintiff cannot be said to constitute discrimination based on his handicap since plaintiff's suspension-prompting behavior has not been shown to be substantially related to his learning disability or defendants' attempts to remedy such disability. Thus, the unequal treatment that is the hallmark of equal protection analysis under any standard is here not sufficiently evident to enable the Court to predict success on the merits of this claim.

Having thus examined the legal merits of plaintiff's claims as they appear at this juncture, it is now appropriate to analyze the balance of harms in the case and the public interest involved. As to the significance of the threat of irreparable harm to plaintiff if his suspension is continued, it is clear that until home tutoring is commenced or a new placement for plaintiff is agreed upon, plaintiff will continue to suffer "the injury inherent in being without any educational program." *Stuart v. Nappi*, *supra*, 443 F. Supp. at 1240. And should it be concluded that plaintiff's current placement, to which he is not scheduled to return until after February 1, 1980, is still appropriate, he would likely be precluded from taking advantage of its special education aspects even if tutored at home. *Id.* Furthermore, in the opinion of psychotherapist Yarmac, plaintiff's learning disability and "sense of failure" may be exacerbated by his absence from the normal school environment and its attendant social structure.

At the same time, however, it is not denied even by plaintiff that defendants have a legitimate interest in preventing the type of behavior exhibited by plaintiff at the Milford Area Senior High School. As discussed by the Court in *Lee v. Macon County Board of Education*, 490 F.2d 458 (5th Cir. 1978), courts should not be "insensitive to the difficulties faced by school officials in attempting to curb disorderly interference with the primary task of the school, which is education. *Id.* at 460. Moreover, courts must be cognizant of the "need for school authorities to be vested with ample authority and discretion" in dealing with such disciplinary problems and accord their judgment considerable deference. *Stuart v. Nappi*, *supra*, 443 F. Supp. at 1243. In addition, especially in cases such as this where there has been no strong showing of a causal relationship between plaintiff's mild disability and the disruptive behavior for which he was suspended, application of the extensive procedural safeguards afforded by the Education for All Handicapped Children Act may itself prove disruptive while not serving its intended purpose:

> [T]he procedural protection accorded handicapped children under the Act may create disparities in the disciplinary treatment of students who have engaged in similar conduct. . . . The perception of this disparity by other students could undermine the credibility of school disciplinary policies.

Note, Enforcing the Right to an "Appropriate" Education, *supra*, 92 Harv. L. Rev. at 1107 n. 33.

Finally, the Court notes that the "public interest" in this case cuts in two directions. On the one hand, Congress itself has declared that "to the maximum extent appropriate, handicapped children [should be] educated with children who are not handicapped, and that special classes, separate schooling, or other removal of handicapped children from the regular educational environment [should] occur[ ] only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." 20 U.S.C. § 1412(5). On the other hand, as echoed in the words of the Milford School Board, deliberate and calculated behavior that is disruptive of a school's educational environment cannot be condoned, even from a student identified as learning disabled, for such may ultimately destroy the school's very ability to function as an institution of learning.

In the long run, the Court is satisfied that the interests of all concerned will best be served by implementation of the change in plaintiff's placement currently under consideration. At this juncture, however, plaintiff is faced with serving fourteen more school days of a suspension whose immediate punitive and deterrent benefits may well be outweighed, if that suspension be required to be fully served, by the consequent exacerbation of plaintiff's identified disability. For this and all the above reasons, the Court hereby orders that plaintiff's suspension from the Milford Area Senior High School be terminated after it has been served for ten (10) school days. (In other words, plaintiff must be allowed to return to his current educational placement at the school on Friday, January 18, 1980, unless, of course, a new placement has been implemented for him by that time.) With the above exception, plaintiff's motion for preliminary injunctive relief is hereby denied.

SO ORDERED.

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JEAN SHERRY, Individually and as Next Friend of her infant child, DELOWEEN SHERRY,

Plaintiff

v.

NEW YORK STATE EDUCATION DEPARTMENT, New York State School for the Blind, and the Olean City School District

Defendants

No. Civ-79-17

United States District Court
W.D. New York

November 5, 1979

CURTIN, Chief Judge

Counsel for Plaintiff: Monroe County Legal Assistance Corp., Southern Tier Legal Services (Michael L. Hanley, Olean, N.Y., of counsel)

Counsel for State Defendants: Robert D. Stone, Albany, N.Y., New York State Education Department (Seth Rockmuller, Buffalo, N.Y., of counsel)

Counsel for Defendant Olean City School District: Shane & Franz, Olean, N.Y. (J. Michael Shane, Olean, N.Y., of counsel)

Action for injunctive and declaratory relief concerning suspension of handicapped child from State school for the blind, allegedly in violation of Education of the Handicapped Act, 20 U.S.C. §§ 1401 *et seq.*, and § 504 of the Rehabilitation Act of 1973. The multiply-handicapped child was removed from the New York State School for the Blind and hospitalized for treatment of self-inflicted injuries. Three weeks later, the Superintendent of the School, which was run directly by the State, informed the child's mother that the school had insufficient staff to supervise the child and that a return to the residential program would be impossible until her condition changed or more staff was hired. Shortly thereafter, following a multidisciplinary meeting at the local district high school, the Superintendent told the mother that if she insisted on returning the child, the school would suspend her and, if she requested it, provide a suspension hearing. The local school district concluded it had no appropriate program for the child and discontinued day program assistance; the mother requested an impartial due process hearing, pursuant to EHA § 1415, from the State school. Within a week, the school suspended the child, informing the mother that the suspension would be revoked whenever "it appears to be in [the child's] and the school's best interests to do so" and that a hearing would be provided, at which the mother and child had a right to representation by counsel.

HELD, allegation that SEA has not provided the impartial hearing required by § 1415(e)(2) *a fortiori* asserts a claim over which the court has jurisdiction under § 1415. Although existence of meaningful administrative enforcement mechanism might preclude judicial review of private claim under § 504, since such a mechanism is lacking, neither the doctrines of exhaustion of administrative remedies or primary jurisdiction applies. While plaintiff has been reinstated in residential program, claim is not moot because the review procedures complained of are still those utilized; moreover, given plaintiff's condition, there is a significant likelihood that problem could repeat itself and the right to review, if any, would again become an issue.

Although during child's hospitalization and perhaps for a short period of time thereafter, it can reasonably be argued that no change of placement occurred and, therefore, no agency hearing or other safeguards under EHA were required, when, approximately one month later, child was no longer in residential program and temporary program of day assistance had terminated, change in the child's educational placement had occurred within the meaning of § 1415.

State regulations governing "due process hearing" for residents of State operated facility that do not employ an impartial hearing officer or provide for maintenance of placement pending resolution of a complaint are not in compliance with § 1415.

A defense of lack of staff cannot justify a default by State educational agency in the provision of an appropriate education to a qualified handicapped child.

Plaintiff's daughter, Deloween Sherry, is fourteen years old. She is legally blind and deaf and she suffers from brain damage and an emotional disorder which makes her self-abusive. There is no question that she is a handicapped individual within the meaning of the Rehabilitation Act of 1973,[1] and the Education of the Handicapped Act ["Handicapped Act"].[2] In September 1978 Deloween Sherry was enrolled at the New York State School for the Blind in Batavia, New York.[3] As a result of injuries resulting from her self-abusive behavior, she was taken back to Olean, New York on November 13, 1978 and hospitalized for medical treatment.

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[1] 29 U.S.C. § 706(7).

[2] 20 U.S.C. § 1401(1).

[3] Prior to this time, Deloween was at the New York Institute for the Blind in the Bronx, New York, a state-supported school. She was appointed to the School for the Blind pursuant to the regulations of the New York State Education Department, 8 NYCRR § 200.6. *See* Stipulations of Counsel, para. 5.

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On November 21, 1978, Glenn E. Thompson, Superintendent of the School for the Blind, wrote a letter to Mrs. Sherry stating that the school did not have sufficient staff to supervise her daughter and that a return to the residential program at the school would be impossible until her condition changed or more staff were hired. *See* Letter of Glenn Thompson, dated November 21, 1978, attached to Plaintiff's Request for Admission. He stated that without a better student-to-staff ratio, the school could not provide the degree of supervision required to prevent Deloween from seriously hurting herself.

A meeting was held at the Olean City School District High School on November 29, 1978. The Olean City District is the school district in which Deloween Sherry resides and is a "local educational agency," as defined in 20 U.S.C. § 1401(8), which receives federal funds for educational programs. This meeting was attended by Mr. Thompson, Mrs. Sherry, representatives of the Olean City School District and its Committee on the Handicapped, a regional associate of the New York State Education Department, the school psychologist from the School for the Blind, and a children's consultant from the New York State Commission for the Visually Handicapped. Superintendent Thompson informed Mrs. Sherry that if she insisted on returning Deloween to the School for the Blind, then the school would suspend her and a suspension hearing would be provided upon request.

In the meantime, the Olean City School District arranged a temporary program to assist Mrs. Sherry with Deloween's behavior. On December 11 and 15, the school district's Committee on the Handicapped discussed whether the district could provide an alternative education program for her. The Committee concluded that it could not and that the most appropriate program available was at the School for the Blind. It recommended that Deloween return to the day program until such time as she could return to the residential program. The school district discontinued its program of assistance to Mrs. Sherry as of the Christmas holidays in December.

On December 27, 1978, plaintiff requested through her attorney that her daughter be reinstated in the residential program of the School for the Blind. It also was requested in the letter that she be afforded the procedural protections provided by the Handicapped Act, 20 U.S.C. § 1415. The School for the Blind, consequently, suspended Deloween, effective January 2, 1979. *See* Letter from Glenn Thompson to Mrs. Sherry, dated December 29, 1978, attached to Plaintiff's Complaint as Exhibit B. This letter informed Mrs. Sherry that the suspension would be revoked whenever "it appears to be in Deloween's and the school's best interests to do so," and that "[Y]ou and Deloween are entitled to a hearing concerning this suspension at which you have the right to representation by counsel."

On January 11, 1979, this action for injunctive and declaratory relief was commenced, seeking the reinstatement of Deloween Sherry in her educational program at the School for the Blind and the revision of defendants' procedures to comply with 20 U.S.C. § 1415. Superintendent Thompson advised Mrs. Sherry on January 19, 1979, that additional supervisory personnel had been authorized for the school and that Deloween's suspension would be revoked as of January 22, 1979. Deloween returned to her residential program at the School for the Blind on January 23, 1979.

In addition to sketching the factual story of what occurred to Deloween Sherry, it is important to set forth certain additional circumstances. As noted above, Mr. Thompson's letter to Mrs. Sherry of January 2, 1979, suspending Deloween, stated that plaintiff was entitled to a hearing. The stipulation entered into by counsel with respect to the motions pending before the court makes reference to this offer. *See* Stipulations of Counsel Regarding Motion To Dismiss and Cross Motion for Summary Judgment, filed May 8, 1979. Paragraph 15 of the stipulation states that this hearing was offered

> in order to comply with the provisions of 8 NYCRR § 200.6(a)(6) that no pupil appointed to a state operated school be suspended for disciplinary reasons without making available due process protections comparable to the provisions of Section 3214 of the New York Education Law.

Paragraph 18 of the stipulation further states that prior to Thompson's letter of December 29, 1978 suspending Deloween, Mrs. Sherry was not advised of the availability of a hearing pursuant to the provisions of the Handicapped Act to review the actions taken by the school. Moreover, para. 19 details the nature of the hearing which the State of New York provides. It states:

> The State Education Department does not appoint impartial hearing officers pursuant to the provisions of P.L. 94-142 [Education of the Handicapped Act] at the state agency level and does not provide for hearings before impartial hearing officers pursuant to the provisions of P.L. 94-142 to review matters related to the identification, evaluation, educational placement or provision of a free appropriate public education of students appointed to state-operated or state-supported schools other than as would be made available at the local school district level to review the appropriateness of a placement to such a state school recommended by the local district, the decision from which would be reviewable to the State Commissioner of Education.

Finally, the defendant New York State Education Department ["Education Department"] is a "state educational agency" within the meaning of the Handicapped Act. Stipulation, para. 2; 20 U.S.C. § 1401(7). The School for the Blind, run directly by the Education Department, is part of that state educational agency.

The defendants have made a motion to dismiss the action. The plaintiff has made a cross-motion for summary judgment.

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Discussion

Jurisdiction and Mootness

In order to understand what follows, the court must discuss initially the statutory framework upon which plaintiff relies. The plaintiff makes a claim under The Education of the Handicapped Act ["Handicapped Act"], as amended, 20 U.S.C. § 1401-61, under § 504 of The Rehabilitation Act of 1973, 29 U.S.C. § 794, and under 42 U.S.C. § 1983 and the Fourteenth Amendment to the Constitution.

With respect to plaintiff's Handicapped Act claim, 20 U.S.C. § 1415 provides extensive procedural safeguards to parents and handicapped children on questions relating to the provision of a free appropriate public education as required under the Act.[4] These procedures include the requirement of written prior notice by the state or local education agency of a proposed change in the educational placement of the child or

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[4] This section provides as follows:

§ 1415. *Procedural safeguards*

Establishment and maintenance

(a) Any State educational agency, any local educational agency, and any intermediate educational unit which receives assistance under this subchapter shall establish and maintain procedures in accordance with subsection (b) through subsection (e) of this section to assure that handicapped children and their parents or guardians are guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies and units.

Required procedures; hearing

(b)(1) The procedures required by this section shall include, but shall not be limited to—

(A) an opportunity for the parents or guardian of a handicapped child to examine all relevant records with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child;

(B) procedures to protect the rights of the child whenever the parents or guardian of the child are not known, unavailable, or the child is a ward of the State, including the assignment of an individual (who shall not be an employee of the State educational agency, local educational agency, or intermediate educational unit involved in the education or care of the child) to act as a surrogate for the parents or guardian;

(C) written prior notice to the parents or guardian of the child whenever such agency or unit—

(i) proposes to initiate or change, or

(ii) refuses to initiate or change,

the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child;

(D) procedures designed to assure that the notice required by clause (C) fully inform the parents or guardian, in the parents' or guardian's native language, unless it clearly is not feasible to do so, of all procedures available pursuant to this section; and

(E) an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.

(2) Whenever a complaint has been received under paragraph (1) of this subsection, the parents or guardian shall have an opportunity for an impartial due process hearing which shall be conducted by the State educational agency or by the local educational agency or intermediate educational unit, as determined by State law or by the State educational agency. No hearing conducted pursuant to the requirements of this paragraph shall be conducted by an employee of such agency or unit involved in the education or care of the child.

Review of local decision by State educational agency

(c) If the hearing required in paragraph (2) of subsection (b) of this section is conducted by a local educational agency or an intermediate educational unit, any party aggrieved by the findings and decision rendered in such a hearing may appeal to the State educational agency which shall conduct an impartial review of such hearing. The officer conducting such review shall make an independent decision upon completion of such review.

Enumeration of rights accorded parties to hearings

(d) Any party to any hearing conducted pursuant to subsections (b) and (c) of this section shall be accorded (1) the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of handicapped children, (2) the right to present evidence and confront, cross-examine, and compel the attendance of witnesses, (3) the right to a written or electronic verbatim record of such hearing, and (4) the right to written findings of fact and decisions (which findings and decisions shall also be transmitted to the advisory panel established pursuant to Section 1413(a)(12) of this title.).

Civil action; jurisdiction

(e)(1) A decision made in a hearing conducted pursuant to paragraph (2) of subsection (b) of this section shall be final, except that any party involved in such hearing may appeal such decision under the provisions of subsection (c) and paragraph (2) of this subsection. A decision made under subsection (c) of this section shall be final, except that any party may bring an action under paragraph (2) of this subsection.

(2) Any party aggrieved by the findings and decision made under subsection (b) of this section who does not have the right to an appeal under subsection (c) of this section, and any party aggrieved by the findings and decision under subsection (c) of this section, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

(3) During the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents or guardian, be placed in the public school program until all such proceedings have been completed.

(4) The district courts of the United States shall have jurisdiction of actions brought under this subsection without regard to the amount in controversy.

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the provision of a free appropriate education and the right to present complaints with respect to such a matter. 20 U.S.C. § 1415(b)(1)(C) and (b)(1)(E). When such a complaint is received, the parents or guardian are entitled to an impartial due process hearing, the precise nature of which is in dispute. *Id.*, § 1415(b)(2). In addition, a party can appeal from this initial, local hearing "to the State educational agency which shall conduct an impartial review of such hearing." *Id.*, § 1415(c). The final provision of § 1415, the most important to this court on the question of jurisdiction, gives a parent or guardian aggrieved by the decisions in the hearings discussed above, the right to bring a civil action in federal district court. *Id.*, §§ 1415(e)(1) - (e)(4).

The defendants contend that the court lacks jurisdiction over plaintiff's claim because she does not appeal from any hearing held by a state educational agency within the meaning of § 1415(e)(2). This is unpersuasive. If an aggrieved party may bring an action to review the decision of the impartial due process hearings provided for under the Handicapped Act, a person who claims that the state defendants have not even provided the impartial hearing as required by federal law *a fortiori* asserts a claim over which this court has jurisdiction. *See Stuart v. Nappi*, 443 F. Supp. 1235 (DM Conn. 1978). Plaintiff is in that position and this court has jurisdiction under § 1415(e).

Defendants' argument that jurisdiction is lacking over plaintiff's claim under § 504 of The Rehabilitation Act is also unavailing.[3] Defendants argue that plaintiff has failed to exhaust her available administrative remedies and that the court should defer to the primary jurisdiction or expertise of the relevant agency, the Department of Health, Education, and Welfare ["HEW"]. The administrative remedies which defendant refers to are set forth in regulations promulgated by HEW. These are designed to ensure that recipients of federal funding do not violate the prohibition of § 504. 45 C.F.R. § 84.61 adopts the compliance procedures used to enforce Title VI of the Civil Rights Act of 1964, which are contained in 45 C.F.R. §§ 80.6-80.10 and Part 81. After investigation, discussion and hearings, the review created by these procedures can result in a cutoff of federal funds if a determination is made that a recipient is in violation, and voluntary compliance is not forthcoming. The cutoff of funding, however, is HEW's only sanction. Although this threat can act as an incentive to recipient agencies, an individual is not afforded an immediate, effective means to vindicate her own rights under § 504 through these administrative regulations. *Whitaker v. Board of Higher Education of City of New York*, 461 F. Supp. 99, 106-09 (E.D. N.Y. 1978).

Given this administrative structure, several circuit courts, including our own, have sustained the existence of a private cause of action under § 504. *Leary v. Crapsey*, 566 F.2d 863 (2d Cir. 1977); *Kampmeier v. Nyquist*n 553 F.2d 296 (2d Cir. 1977); *Lloyd v. Regional Transp. Auth.*, 548 F.2d 1277 (7th Cir. 1977); *United Handicapped Federation v. Andre*, 558 F.2d 413 (8th Cir. 1977); *see Whitaker, supra*, at 107. If a meaningful administrative enforcement mechanism existed, judicial review might be precluded until after administrative avenues had been exhausted. *Lloyd, supra*, at 1286, n.29; *Whitaker, supra*, at 107. Since such a mechanism is lacking, however, neither the exhaustion nor the primary jurisdiction doctrine applies. *Lloyd, supra*, at 1287; *Whitaker, supra*, at 107-09. The court, therefore, has jurisdiction over plaintiff's § 504 claim under 28 U.S.C. § 1343.

The final jurisdictional objection of defendants can be disposed of without difficulty. They argue that the court lacks jurisdiction over plaintiff's 42 U.S.C. § 1983 claim that her due process rights under the Fourteenth Amendment were violated. 28 U.S.C. § 1343(c) confers jurisdiction to entertain the constitutional claim if it is of sufficient substance. *Hagans v. Lavine*, 415 U.S. 528, 94 S.Ct. 1372, 39 L.Ed.2d 577 (1974). Without resolving the merits, plaintiff's claim is not a frivolous one and there can be no question that the court has jurisdiction.

In addition to jurisdictional questions, the court is faced with a question of mootness. At the time this action was commenced, Deloween Sherry was suspended and not in her residential program at the School for the Blind. Part of the relief which plaintiff seeks is an injunction ordering (1) Deloween's reinstatement at the school and the provision of the necessary educational and related services, and (2) her local residential school district to provide her an appropriate public education until that reinstatement. Since this action was commenced, Deloween was reinstated at the School for the Blind and the defendants contend that the action is now moot.

An issue becomes moot and no longer justiciable when, as a result of intervening circumstances, there are no longer adverse parties with sufficient legal interests to maintain the litigation. *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115, 122, 94 S.Ct. 1694, 40 L.Ed 2d 1 (1974); *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273, 61 S.Ct. 510, 85 L.Ed. 826 (1941). Although a determination of such a question requires an analysis of the Article III principles which mandate a "case or controversy," it also requires a highly individualized appraisal of each case. Moreover, the performance of the particular act sought to be enjoined may moot the issue of an injunction, but where there is a likelihood that the act complained of will be repeated, the issues remain justiciable and a declaratory judgment may be rendered to define the rights and obligations of the parties. 6A Moore's Federal Practice, para. 57.-13; *see United States v. Phosphate Export Assn.*, 393 U.S. 199, 203, 89 S.Ct. 361, 21 L.Ed.2d 344 (1968). Even if later events have reduced the practical importance of a case to the parties, the question is whether the alleged wrongful behavior could not reasonably be expected to recur. *St. Paul Fire & Marine Insurance Co. v. Barry*, 438 U.S. 531, 538, 98 S.Ct. 2923, 57 L.Ed.2d 932 (1978); *Phosphate Export Assn., supra*, at 203, 89 S.Ct. 361; *see United States v. W. T. Grant Co.*, 345 U.S. 629, 632-33, 73 S.Ct. 894, 97 L.Ed. 1303 (1953).

In this case, plaintiff's complaint requests not only injunctive relief but a declaratory judgment that defendants' failure to comply with the requirements of 20 U.S.C. § 1415 was unlawful and that her suspension violated the Handicapped Act, § 504 of The Rehabilitation Act, and the Due Process and Equal Protection clauses of the Fourteenth Amendment. She argues that despite her reinstatement, a great likelihood exists that the situation which triggered this

[3] § 504 is set out in detail *infra*.

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action could repeat itself. The court agrees with respect to the state defendants. The review procedures about which the plaintiff and the defendants disagree are still those which the defendants utilize. From the very beginning, the plaintiff has sought not only an injunction but also declaratory relief that the state's procedures do not meet the requirements of 20 U.S.C. § 1415. As the Supreme Court has stated repeatedly, in such a situation the district court has "'the duty to decide the appropriateness and the merits of the declaratory request irrespective of its conclusion as to the propriety of the issuance of the injunction.' *Zwickler v. Koota*, 389 U.S. 241, 254 [88 S.Ct. 391, 19 L.Ed.2d 444] (1967); *Roe v. Wade*, 410 U.Sm 113, 166 [93 S.Ct. 705, 35 L.Ed.2d 147] (1973); *Steffel v. Thompson*, 415 U.S. 452, 468d469 [94 S.Ct. 1209, 39 L.Ed.2d 505] (1974)." *Super Tire, supra*, at 121, 94 S.Ct. at 1698. The immediate relief of reinstatement has been obtained. But, given Deloween's condition, there is a significant likelihood that the problem could repeat itself and the right to review, if any, would again become an issue. Given these circumstances, plaintiff has a continuing interest in having the court define the obligations and rights of the parties.

With respect to the defendant Olean City School District, plaintiff's single demand for relief is for an injunction requiring it to provide an appropriate education and services until Deloween is reinstated at the School for the Blind. This reinstatement has occurred. Plaintiff's interest and demands for relief now are directed solely toward the state defendants and their procedures. Plaintiff's claim against the Olean City School District, therefore is moot.[6]

Merits

As sketched out briefly above, the Handicapped Act and its amendments are designed to assure that all handicapped children have available to them a free appropriate public education and related services designed to meet their unique needs. 20 U.S.C. § 1415 guarantees that these children and their parents or guardians are afforded certain procedural rights relating to this education. The plaintiff contends that the defendants: (1) failed to provide her with written prior notice of a change in Deloween's "educational placement," pursuant to § 1415(b)(1)(C); (2) failed to afford her the opportunity for an impartial due process hearing conducted by someone who is not an employee of the Education Department, pursuant to § 1415(c); and (3) failed to allow Deloween to remain in her current educational placement pending the administrative hearing and determination, pursuant to § 1415(e)(3). Plaintiff recognizes the need for an agency such as the School for the Blind to be able to suspend someone like Deloween on an emergency, temporary basis. Plaintiff argues, however, that defendants' actions resulted in more than a temporary suspension, and that in fact a change in Deloween's educational placement occurred without her parents being afforded an opportunity for an impartial due process hearing and without Deloween remaining in the School for the Blind pending its outcome. On December 27, 1978, Mrs. Sherry demanded that these procedural safeguards be provided. Defendants did not do so and, instead, formally suspended Deloween for an indefinite period.

The defendants argue that no change in Deloween's educational placement occurred within the meaning of the Handicapped Act; thus, these procedural safeguards are not technically applicable. Defendants rely on a regulation promulgated under the Handicapped Act by HEW, codified as 45 C.F.R. Reg. 121a.513. This regulation reiterates the dictate of 20 U.S.C. § 1415(e)(3) that, during the pendency of any administrative or judicial proceeding regarding a complaint, the child involved must remain in her present educational placement unless the agency and the child's parents agree otherwise. The comment to this regulation includes the following statement: "While the placement may not be changed, this does not preclude a school from using its normal procedures for dealing with children who are endangering themselves or others." Defendants contend that the suspension of Deloween was valid because suspension is the school's normal procedure for dealing with a child who is a danger to herself.

Defendants point to § 200.6(a)(6) of the Regulations of the Commissioner of Education of the State of New York, which incorporates procedures comparable to those set forth in § 3214 of the New York State Education Law.[7] Section

[6] As evidenced by the affidavit of Martin Welch, Superintendent of the Olean City School District, considerable confusion exists as to the exact scope of the duty under the Handicapped Act of a local school district when a handicapped child has been appointed to a state school. For example, Mr. Welch states that the Education Department has promulgated no guidelines as to whether it is the duty of the "local educational agency" or the state agency to provide notice and a hearing when a parent like Mrs. Sherry has a complaint about placement. When, as here, the child has been in a school directly run by the State Education Department, it would seem that the responsibility lies with the state agency.

[7] N.Y.Ed.Law § 3214 provides in relevant j-part:

3. Suspension of a pupil. a. The board of education, board of trustees or sole trustee, the superintendent of schools, or district superintendent of schools may suspend the following pupils from required attendance upon instruction

* * * * *

(2). A pupil whose physical or mental condition endangers the health, safety, or morals of himself or of other pupils;

* * * * *

(c) No pupil may be suspended for a period in excess of five school days unless such pupil and the person in parental relation to such pupil shall have had an opportunity for a fair hearing, upon reasonable notice, at which such pupil shall have the right of representation by counsel, with the right to question witnesses against such pupil and to present witnesses and other evidence on his behalf. Where a pupil has been suspended in accordance with this section by a superintendent of schools, district superintendent of schools or community superintendent, the superintendent shall personally hear and determine the proceeding or may, in his discretion, designate a hearing officer to conduct the hearing. The hearing officer shall be authorized to administer oaths and to issue subpoenas in conjunction with the proceeding before him. A record of the hearing shall be maintained, but no stenographic transcript shall be required and a tape recording shall be deemed a satisfactory record. The hearing officer shall

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3214(3) authorizes suspension of a pupil whose physical or mental condition endangers the health and safety of himself or others; a right to a due process hearing where suspension exceeds five days is included. Defendants contend that plaintiff chose not to avail herself of the school's offer of such a hearing on December 29, 1978, and that the specific procedures provided for in 20 U.S.C. § 1415 were not required. As a final argument, defendants assert that their procedures for administrative review substantially comply with what is required by the Handicapped Act. "Certain adjustments are necessary due to the role of the State Commissioner of Education in all educational matters within the state." Defendants' Memorandum at 14.

Defendants' arguments are not persuasive. As plaintiff concedes, and as HEW has suggested in its interpretation of § 1415(e)(3), it is necessary that an agency like the School for the Blind have the right to suspend a handicapped student who is a danger to herself on an emergency basis. Under a fair reading of § 1415, one can appreciate that during Deloween's hospitalization and perhaps for a short period of time thereafter, no change in her educational placement occurred by reason of the suspension. Thus, no agency hearing or other safeguards under the Handicapped Act were required. On November 21, 1978, eight days after Deloween was hospitalized, Superintendent Thompson notified Mrs. Sherry by letter that it was in the best interests of Deloween that she not reenter the School for the Blind without first meeting with Mrs. Sherry. This letter strongly suggests that the school recognized the necessarily temporary nature of Deloween's absence. At least by December 27, 1978, however, the time Mrs. Sherry requested reinstatement of Deloween at the School for the Blind and an impartial hearing, it is clear that Deloween's educational placement had changed. Deloween was no longer in the school and its residential program and the temporary program of assistance set up by the Olean district to help Mrs. Sherry with Deloween's behavior had terminated. Superintendent Thompson's letter of December 29, 1979, formally suspending Deloween from the School for the Blind, made certain that she was no longer placed at this school, and this suspension was for an indefinite period. In the ordinary sense of the word, a significant change had occurred in her situation. The only reasonable conclusion is that her educational placement had been changed within the meaning of § 1415. The comment to 45 C.F.R. Reg. 121a.513, providing for the use of normal state procedures where a child is a danger to herself, may permit a temporary suspension. It does not permit defendants, however, to ignore the procedural safeguards of § 1415 when that temporary, emergency response to a handicapped students' behavior becomes a change in her educational placement. *See Stuart v. Nappi*, 443 F. Supp. 1235, 1240-43 (D. Conn. 1978). Defendants' argument that their procedural safeguards substantially comply with § 1415 is of no help. In the first place, § 3214(3) and § 1415 differ in at least one important respect. As defendants have stipulated, the "due process hearing" which they provide, and offered to plaintiff without success, is not conducted by an impartial hearing officer, that is, a hearing officer not employed by the educational agency providing the appropriate education. Defendants' proffered explanation for this difference, that the decision of an impartial hearing officer would be inconsistent with the Commissioner of Education's statutory role as the highest authority on educational matters, is unsatisfactory. Moreover, unlike § 1415, there is no provision in § 3214 requiring the agency to allow a child to remain in place pending resolution of a complaint. Second, the substantial compliance term of § 1416 refers to a state's compliance for purposes of receiving federal funds. *See* §§ 1416 and 1412(2). The defendants' argument is not without some merit. The language of § 1415, however, which provides that a state plan "shall include, but not be limited to, [the following procedural safeguards]," strongly suggests that a hearing before an impartial hearing officer is the minimum for compliance with the procedural guarantees of § 1415. Moreover, the provision in § 1415(e) for a private cause of action indicates that the procedural guarantees provide a separate, independent enforcement mechanism, distinct from the cutoff of federal funds. Failure to provide a major component of that mechanism, such as an impartial hearing, cannot be circumvented by claiming substantial compliance.

To sum up this discussion, the defendants' failure to provide plaintiff with the procedural guarantees of the Handicapped Act, including their failure to maintain her in her then-current educational placement and failure to provide a hearing before an impartial hearing officer, violated 20 U.S.C. § 1415.* Pursuant to authority granted under 28 U.S.C. § 2202, the defendants are directed to establish procedures which comport with § 1415.

Plaintiff also requests a declaratory judgment that defendants' suspension of Deloween Sherry violated § 504 of

make findings of fact and recommendations as to the appropriate measure of discipline to the superintendent. The report of the hearing officer shall be advisory only, and the superintendent may accept all or any part thereof. An appeal will lie from the decision of the superintendent to the board of education who shall make its decision solely upon the record before it. The board may adopt in whole or in part the decision of the superintendent of schools.

Where a pupil has been suspended in accordance with this section by a board of education, the board may in its discretion hear and determine the proceeding or appoint a hearing officer who shall have the same powers and duties with respect to the board that a hearing officer has with respect to a superintendent where the suspension was ordered by him. The findings and recommendations of the hearing officer conducting the proceeding shall be advisory and subject to final action by the board of education, each member of which shall before voting review the testimony and acquaint himself with the evidence in the case. The board may reject, confirm or modify the conclusions of the hearing officer. (McKinney's, Pocket Part for 1978-79.

* Plaintiff also complains of defendants' failure to provide notice within the meaning of § 1415. Under the factual circumstances of this case, that issue is not paramount. Section 1415 certainly requires notice prior to any proposed change in a handicapped student's educational placement. § 1415(b)(1)(C). *Defendants should recognize this duty.* In this case, however, the particular change in placement was brought about by an emergency and, in light of the offer of a hearing to Mrs. Sherry, some notice was given.

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the Rehabilitation Act of 1973 and the Fourteenth Amendment. Section 504 provides, in relevant part:

> No otherwise qualified handicapped individual in the United States, as defined in Section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necesary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978 . . .

29 U.S.C. § 794. Defendants argue that the suspension of Deloween Sherry was not unlawful because the suspension was not solely by reason of her handicap. Rather, suspension, pending a satisfactory resolution of how to cope with her problem, was necessary because she posed a danger to herself by virtue of her self-abusive character. This reason is said to constitute a substantial justification for Deloween's suspension from the School for the Blind.

Plaintiff contends that the HEW regulations effectuating § 504 provide a yardstick for measuring compliance with that section and that defendants have failed to satisfy their requirements. These regulations are found in 45 C.F.R. Part 84. Plaintiff specifically points to 45 C.F.R. Reg. 84.33 which provides, in relevant part:

> (a) *General*. A recipient that operates a public elementary or secondary education program shall provide a free appropriate public education to each qualified handicapped person who is in the recipient's jurisdiction, regardless of the nature or severity of the person's handicap.
>
> (b) *Appropriate education*. (1) For the purpose of this subpart, the provision of an appropriate education is the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met and (ii) are based upon adherence to procedures that satisfy the requirements of §§ 84.34, 84.35, and 84.36.

Plaintiff argues that the sole reason for Deloween's suspension from her educational program was the failure of defendants to provide "related aids and services" in the form of adequate supervision, thus denying her access to a program designed to meet her needs.

At first blush, defendants' argument is persuasive. Deloween Sherry was sent home from the School for the Blind, and subsequently suspended, because she was a danger to herself without the supervisory staff which the school did not have. Therefore, she was not excluded from the federally-subsidized educational program solely by reason of her handicap within the meaning of § 504. This initial impression needs further exploration, however.

The HEW regulations require a recipient agency to provide an appropriate education to all children regardless of the nature or severity of the child's handicaps. 45 C.F.R. Reg. 84.33(a). This education includes the provision of "related aids and services" designed to meet the individual needs of handicapped persons. *Id.*, at Reg. 84.33(b). These regulations are entitled to considerable deference by the court. In this case, they indicate that a recipient agency has an obligation to provide the supervisory staff necessary to allow a handicapped student to benefit from the services of that agency. Deloween Sherry certainly is seriously handicapped; not only is she deaf and blind, but she suffers from brain damage and an emotional disorder which makes her self-abusive. The regulations properly mandate, though, that regardless of the severity of a child's handicap, an appropriate education be provided. That education must encompass, as a related aid and service, the supervisory staff necessary to make that education possible. As evidenced by the reinstatement of Deloween when more staff were hired at the school, the reason for her suspension was the failure of the School for the Blind to provide the necessary related services.

In reaching this conclusion, the court does not question the defendants' motivation; it is clear that they were concerned for her safety. Nonetheless, this cannot be a substantial justification when the concern could have been alleviated or eliminated if the defendants had complied with their duty to provide the service of supervision as part of her appropriate educational program. A defense of lack of staff cannot justify a default by defendants in the provision of an appropriate education to the plaintiff. *See Lora v. Board of Education of City of New York*, 456 F. Supp. 1211, 1292-93 (S.D. N.Y. 1978). The suspension of Deloween Sherry "until it appears to be in Deloween's and the School's best interests to [revoke it]" was unlawful within the meaning of § 504. We need not reach the question of whether the exclusion violated her rights to equal protection and due process under the Fourteenth Amendment.

In conclusion defendants' motion to dismiss under Rule 12 is denied. Plaintiff's motion for summary judgment under Rule 56 is granted insofar as the court declares that defendants' failure to provide the procedural safeguards of 20 U.S.C. § 1415 to plaintiff was unlawful and that their indefinite suspension of Deloween Sherry was an unlawful exclusion within the meaning of § 504 of the Rehabilitation Act. In conjunction with this declaratory judgment, the defendants are directed to establish procedures which comport with § 1415.

So ordered.

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Kathy STUART, by and through her mother and next friend, Joan Stuart, Plaintiffs,

v.

Pasquale NAPPI, Individually and in his capacity as Superintendent, Danbury Public Schools, Carl Susnitsky, Henrique Antonio, Paul Werner, Paul Baird, Theresa Boccuzzi, Bunny Jacobson, Tonio Pepe, Barbara Baker, Henry Bessel, Robert Jones, Individually and in their capacities as Members of the Danbury Board of Education, Defendants.

Civ. No. B-77-381.

United States District Court, D. Connecticut.

Jan. 4, 1978.

Proceeding was instituted on motion of plaintiff to obtain preliminary relief against

disclosure. The Contract Compliance Officer will inform the contractor of such a determination. The contractor may appeal that ruling to the Director of OFCC within 10 days. The Director of OFCC shall make a final determination within 10 days of the filing of the appeal.

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her expulsion from high school by defendants. The District Court, Daly, J., held that preliminary injunction would issue to enjoin defendants from conducting a hearing to expel plaintiff from high school and to require defendants to conduct an immediate review of plaintiff's special education program where plaintiff made a persuasive showing of possible irreparable injury in that she had deficient academic skills caused by a complex of learning disabilities and limited intelligence and, if expelled, would be without any educational program from date of expulsion until such time as another review was held and an appropriate educational program developed, and plaintiff demonstrated probable success on merits of federal claims that she was denied her rights under the Education of the Handicapped Act to appropriate public education, to remain in her present placement until resolution of her special education complaint, to an education in the least restrictive environment, and to have all changes of placement effectuated in accordance with prescribed procedures.

Preliminary relief ordered.

1. Injunction ⇐136(3), 137(4)

A plaintiff wishing to obtain a preliminary injunction must demonstrate either probable success on the merits of the claim and possible irreparable injury or sufficiently serious questions going to the merits of the claim and a balance of hardships tipping decidedly in his favor.

2. Injunction ⇐136(3), 137(4)

Preliminary injunction would issue to enjoin defendants from conducting a hearing to expel plaintiff from high school and to require defendants to conduct an immediate review of plaintiff's special education program where plaintiff made a persuasive showing of possible irreparable injury in that she had deficient academic skills caused by a complex of learning disabilities and limited intelligence and, if expelled, would be without any educational program from date of expulsion until such time as another review was held and an appropriate educational program developed, and plaintiff demonstrated probable success on merits of federal claims that she was denied her rights under the Education of the Handicapped Act to appropriate public education, to remain in her present placement until resolution of her special education complaint, to an education in the least restrictive environment, and to have all changes of placement effectuated in accordance with prescribed procedures. Education of the Handicapped Act, §§ 602(1), (15-19), 612(5)(B), 615(b)(1)(C, E), (c), (e)(3, 4) as amended 20 U.S.C.A. §§ 1401(1), (15 19), 1412(5)(B), 1415(b)(1)(C, E), (c), (e)(3, 4).

3. Federal Courts ⇐14

Claim that act of defendants in expelling plaintiff from high school was in contravention of Connecticut statutes was based on argument that plaintiff was entitled to a current psychological evaluation and a determination of the adequacy of her special education placement prior to an expulsion hearing and, as such, was exclusively a state claim that was to be ruled upon by a state court in first instance before a district court could exercise its pendent jurisdiction over same. C.G.S.A. §§ 4-177, 4-177(c), 10-233d.

4. Schools and School Districts ⇐169, 177

Provision of the Education of the Handicapped Act that during pendency of any proceedings child shall remain in current educational placement, unless state or local educational agency and parents or guardian otherwise agree, operates to prohibit disciplinary measures which have effect of changing a child's placement and so prohibits expulsion of handicapped children during pendency of a special education complaint. Education of the Handicapped Act, § 615(b)(1)(E), (e)(3) as amended 20 U.S.C.A. § 1415(b)(1)(E), (e)(3).

5. Schools and School Districts ⇐177

Use of expulsion proceedings as a means of changing a placement of a disruptive handicapped child contravenes provisions of the Education of the Handicapped Act governing procedure whereby disruptive children may be transferred to more

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restrictive placements when their behavior significantly impairs education of other children. Education of the Handicapped Act, §§ 612(5)(B), 615(b)(1)(C), (c) as amended 20 U.S.C.A. §§ 1412(5)(B), 1415(b)(1)(C), (c).

6. Schools and School Districts ⇐169, 177

Handicapped children are neither immune from a school's disciplinary process nor are they entitled to participate in programs when their behavior impairs education of other children in program; school authorities can take swift disciplinary measures, such as suspension, against disruptive handicapped children, and can request a change in placement of handicapped children who have demonstrated that their present placement is inappropriate by disrupting education of other children. Education of the Handicapped Act, §§ 612(5)(B), 615(b)(1)(C), (c) as amended 20 U.S.C.A. §§ 1412(5)(B), 1415(b)(1)(C), (c).

7. Schools and School Districts ⇐169

Although there is little doubt that judgment of state and local school authorities is entitled to considerable deference, it is equally clear that even a school's disciplinary procedures are subject to scrutiny of federal judiciary in such instances as noncompliance with procedural safeguards of the Education of the Handicapped Act. Education of the Handicapped Act, § 615(e)(4) as amended 20 U.S.C.A. § 1415(e)(4).

8. Federal Courts ⇐332

Provisions of the Education of the Handicapped Act rests jurisdiction in federal district courts over all claims of noncompliance with procedural safeguards of the Act regardless of the amount in controversy. Education of the Handicapped Act, § 615(e)(4) as amended 20 U.S.C.A. § 1415(e)(4).

Wenner A. Lohe, Jr., Danbury, Conn., John A. Dziamba, Willimantic, Conn., for plaintiffs.

Russell Lee Post, Jr., Avon, Conn., Robert W. Garvey, Hartford, Conn., for defendants.

MEMORANDUM OF DECISION

DALY, District Judge.

Plaintiff, Kathy Stuart [1], is in her third year at Danbury High School. The records kept by the Danbury School System concerning plaintiff tell of a student with serious academic and emotional difficulties. They describe her as having deficient academic skills caused by a complex of learning disabilities and limited intelligence. Not surprising, her record also reflects a history of behavioral problems. It was precisely for handicapped children such as plaintiff that Congress enacted the Education of the Handicapped Act (Handicapped Act), 20 U.S.C. § 1401 *et seq.* *See* 20 U.S.C. § 1401(1).

Plaintiff seeks a preliminary injunction of an expulsion hearing to be held by the Danbury Board of Education. She claims that she has been denied rights afforded her by the Handicapped Act. Her claims raise novel issues concerning the impact of recent regulations to the Handicapped Act on the disciplinary process of local schools.

The Handicapped Act was passed in 1970 and amended in 1975. Its purpose is to provide states with federal assistance for the education of handicapped children. *See* 45 C.F.R. § 121a at 374 (Appendix § 2.1) (1976). The regulations on which this decision turns became effective on October 1, 1977. *See* 42 Fed.Reg. 42,473 (1977) (to be codified in 45 C.F.R. § 121a). State eligibility for federal funding under the Handicapped Act is made contingent upon the implementation of a detailed state plan and upon compliance with certain procedural safeguards. *See* 20 U.S.C. §§ 1413, 1415. The state plan must require all public schools within the state to provide educational programs which meet the unique needs of handicapped children. *See Kruse v. Campbell*, 431 F.Supp. 180, 186 (E.D.Va.),

1. Pursuant to counsel's request, plaintiff is proceeding under a fictitious name. Those sections of the file reflecting her real name have been sealed from public inspection.

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vacated and remanded, — U.S. —, —, 98 S.Ct. 38, 54 L.Ed.2d 65 (October 4, 1977); *cf. Cuyahoga County Association For Retarded Children and Adults v. Essex*, 411 F.Supp. 46, 61 n. 7 (N.D.Ohio 1976). Connecticut's plan has been approved and the state presently receives federal funds. As a handicapped student in a recipient state, plaintiff is entitled to a special education program that is responsive to her needs and may insist on compliance with the procedural safeguards contained in the Handicapped Act. After scrutinizing the recent regulations to the Handicapped Act and reviewing both plaintiff's involved school record and the evidence introduced at the preliminary injunction hearing, this Court is persuaded that a preliminary injunction should issue.

The events leading to the present controversy begun in 1975 when one of plaintiff's teachers reported to the school guidance counselor that plaintiff was "academically unable to achieve success in his class." As a result of this report and corroboration from her other teachers, it was suggested that plaintiff be given a psychological evaluation and that she be referred to a Planning and Placement Team (PPT). The members of a PPT are drawn from a variety of disciplines, but in all cases they are "professional personnel" employed by the local board of education.[2] The PPT's functions are to identify children requiring special education, to prescribe special education programs, and to evaluate these programs.

A meeting of the PPT was held in February of 1975, at which plaintiff was diagnosed as having a major learning disability. The PPT recommended that plaintiff be scheduled on a trial basis in the special education program for remediating learning disabilities and that she be given a psychological evaluation. Although the PPT report specifically stated that the psychological evaluation be given "at the earliest feasible time", no such evaluation was administered.

A second PPT meeting was held in May in order to give plaintiff the annual review mandated by Conn.Reg. § 10-76h-7(b). The PPT reported plaintiff had made encouraging gains, but she suffered from poor learning behaviors and emotional difficulties. A psychological evaluation was again recommended. Her continued participation in the special educational program was also advised, but it was made contingent upon the results of the psychological evaluation.

When school commenced in September of 1975, the PPT requested an immediate psychological evaluation. The PPT stated that an evaluation was essential in order to develop an appropriate special education program. For reasons which have not been explained to the Court, the psychological evaluation was not administered for some time, and the clinical psychologist's report of the evaluation was not completed until January 22, 1976. The report stated that plaintiff had severe learning disabilities derived from either a minimal brain dysfunction or an organically rooted perceptual disorder. It recommended her continued participation in the special education program and concluded: "I can only imagine that someone with such deficit and lack of development must feel utterly lost and humiliated at this point in adolescence in a public school where other students . . . are performing in such contrast to her." The report of plaintiff's psychological evaluation was reviewed at a March, 1976 PPT meeting. The PPT noted that plaintiff was responding remarkably well to the intensive one-to-one teaching she received in the special education program, and recommended that she continue the program until the close of the 1975-1976 school year.

The first indication that the special education program was no longer appropriate came in May of 1976. At that time plaintiff's special education teacher reported that plaintiff had all but stopped attending the program. The teacher requested a PPT meeting to consider whether plaintiff's primary handicap was an emotional disability

2. The PPT is defined in Conn.Reg. § 10-76b-1(q) as "The group of persons chosen from the teaching, administrative and pupil personnel staff of the school district . . ."

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rather than a learning disability. Despite this request, plaintiff's schedule was not changed nor was a PPT meeting held to review her program before the close of the school year.

At the beginning of the 1976-1977 school year, plaintiff was scheduled to participate in a learning disability program on a part-time basis. Her attendance continued to decline throughout the first half of the school year. By late fall she had completely stopped attending her special education classes and had begun to spend this time wandering the school corridors with her friends. Although she was encouraged to participate in the special education classes, the PPT meeting concerning plaintiff's program, which had been requested at the end of the previous school year, was not conducted in the fall of 1976.

In December of 1976 plaintiff was involved in several incidents which resulted in a series of disciplinary conferences between her mother and school authorities. These conferences were followed by a temporary improvement in plaintiff's attendance and behavior. In light of these improvements, the annual PPT review held in March of 1977 concluded that plaintiff should continue to participate in the special education program on a part-time basis for the remaining three months of the school year. The PPT also recommended that in the next school year plaintiff be scheduled for daily special education classes and that she be considered for a special education vocational training program. The PPT report stated that it was of primary importance for plaintiff to be given a program of study in the 1977-1978 school year which was based on a realistic assessment of her abilities and interests.

Despite the PPT recommendation, plaintiff has not been attending any learning disability program this school year. It is unclear whether this resulted from the school's failure to schedule plaintiff properly or from plaintiff's refusal to attend the program. Regardless of the reason, the school authorities were on notice in the early part of September that the program prescribed by the PPT in March of 1977 was not being administered. In fact, a member of the school staff who was familiar with plaintiff requested that a new PPT review be conducted. This review has never been undertaken.

On September 14, 1977 plaintiff was involved in school-wide disturbances which erupted at Danbury High School. As a result of her complicity in these disturbances, she received a ten-day disciplinary suspension and was scheduled to appear at a disciplinary hearing on November 30, 1977. The Superintendent of Danbury Schools recommended to the Danbury Board of Education that plaintiff be expelled for the remainder of the 1977-1978 school year at this hearing.

Plaintiff's counsel made a written request on November 16, 1977 to the Danbury Board of Education for a hearing and a review of plaintiff's special education program in accordance with Conn.Gen.Stat. § 10-76h. On November 29, 1977 plaintiff obtained a temporary restraining order from this Court which enjoined the defendants from conducting the disciplinary hearing. This order was continued on December 12, 1977 at the conclusion of the preliminary injunction hearing. Between the time the first temporary restraining order was issued and the preliminary injunction hearing was held plaintiff was given a psychological evaluation. However, the results of this evaluation were unavailable at the time of the hearing. A PPT review of plaintiff's program has not been conducted since March of 1977, nor has the school developed a new special education program for plaintiff. Furthermore, there was no showing at the hearing that plaintiff's attendance at Danbury High School would endanger her or others.

[1] Plaintiff is entitled to a preliminary injunction enjoining Danbury Board of Education from conducting a hearing to expel her. The standard which governs the issuance of a preliminary injunction is well-settled. Plaintiff must demonstrate either (1) probable success on the merits of her claim and possible irreparable injury, or (2)

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sufficiently serious questions going to the merits of her claim and a balance of hardship tipping decidedly in her favor. *Triebwasser & Katz v. American Tel. & Tel. Co.*, 535 F.2d 1356, 1358 (2d Cir. 1976); *Sonesta Int'l Hotels Corp. v. Wellington Associates*, 483 F.2d 247, 250 (2d Cir. 1973); *City of Hartford v. Hills*, 408 F.Supp. 879, 882 (D.Conn.1975). In *Triebwasser supra* at 1359 the Second Circuit stated that a demonstration of possible irreparable harm is required under both of these alternatives.

[2] Plaintiff has made a persuasive showing of possible irreparable injury. It is important to note that the issuance of a preliminary injunction is contingent upon *possible* injury. The irreparable injuries claimed by plaintiff are those which will result from her expulsion at the Board of Education hearing. In this situation the Court must assume that she will, in fact, be expelled, and then proceed to consider the probable consequences of her expulsion. If plaintiff is expelled, she will be without any educational program from the date of her expulsion until such time as another PPT review is held and an appropriate educational program is developed. In light of past delays in the administration of plaintiff's special education program, the Court is concerned that some time may pass before plaintiff is afforded the special education to which she is entitled. However, even assuming her new program is developed with dispatch, for a period of time plaintiff will suffer the injury inherent in being without any educational program. The second irreparable injury to which plaintiff will be subjected derives from the fact that her expulsion will preclude her from taking part in any special education programs offered at Danbury High School. If plaintiff is expelled, she will be restricted to placement in a private school or to homebound tutoring. Regardless of whether these two alternatives are responsive to plaintiff's needs, the PPT will be limited to their use in fashioning a new special education program for plaintiff. Of particular concern to the Court is the possibility that an appropriate private placement will be unavailable and plaintiff's education will be reduced to some type of homebound tutoring. Such a result can only serve to hinder plaintiff's social development and to perpetuate the vicious cycle in which she is caught. *See Hairston v. Drosick*, 423 F.Supp. 180, 183 (S.D.W.Va.1973) (holding that it is "imperative that every child receive an education with his or her peers insofar as it is at all possible"). The Court is persuaded that plaintiff's expulsion would have been accompanied by a very real possibility of irreparable injury.

[3] Plaintiff has also demonstrated probable success on the merits of four federal claims.[3] The Handicapped Act and the regulations thereunder detail specific rights to which handicapped children are entitled. Among these rights are: (1) the right to an "appropriate public education"; (2) the right to remain in her present placement until the resolution of her special education complaint; (3) the right to an education in the "least restrictive environment"; and (4) the right to have all changes of placement effectuated in accordance with prescribed procedures. Plaintiff claims she has been or will be denied these rights.

Plaintiff argues with no little force that she has been denied her right to an "appropriate public education." The meaning of this term is clarified in the definitional section of the Handicapped Act. Essentially, it is defined so as to require Danbury High

3. Plaintiff makes an intriguing state claim that her expulsion contravenes Conn.Gen.Stat. §§ 10-233d, 4-177. This claim is based on the argument that plaintiff is entitled to a current psychological evaluation and a PPT determination of the adequacy of her special education placement prior to an expulsion hearing. The thrust of this argument is that without a current evaluation and PPT determination plaintiff is being denied a meaningful opportunity "to present evidence and argument on all issues involved" as required by Conn.Gen.Stat. § 4-177(c). This is exclusively a state claim and a state court should rule on it in the first instance. *Cf. Railroad Comm'n v. Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1940). Until such time as a state court has clarified the meaning of Conn.Gen.Stat. § 4-177, this Court will decline to exercise its discretionary, pendent jurisdiction over this claim.

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School to provide plaintiff with an educational program specially designed to meet her learning disabilities. *See* 20 U.S.C. § 1401(1), (15)-(19). The record before this Court suggests that plaintiff has not been provided with an appropriate education. Evidence has been introduced which shows that Danbury High School not only failed to provide plaintiff with the special education program recommended by the PPT in March of 1977, but that the high school neglected to respond adequately when it learned plaintiff was no longer participating in the special education program it had provided. The Court cannot disregard the possibility that Danbury High School's handling of plaintiff may have contributed to her disruptive behavior. The existence of a causal relationship between plaintiff's academic program and her anti-social behavior was supported by expert testimony introduced at the preliminary injunction hearing. *Cf. Frederick v. Thomas*, 408 F.Supp. 832, 835 (E.D.Pa.1976) (argument that inappropriate educational placement caused anti-social behavior is raised). If a subsequent PPT were to conclude that plaintiff has not been given an appropriate special education placement, then the defendant's resort to its disciplinary process is unjustifiable. The Court is not making a final determination of whether plaintiff has been afforded an appropriate education. The resolution of this question is beyond the scope of the present inquiry. In order to sustain a preliminary injunction plaintiff need only demonstrate probable success on the merits of her claim. She has satisfied this standard.

Plaintiff also claims that her expulsion prior to the resolution of her special education complaint would be in violation of 20 U.S.C. § 1415(e)(3).[4] This subsection of the Handicapped Act states: "During the pendency of any proceedings conducted pursuant to this section, unless the state or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child . . . until all such proceedings have been completed." Plaintiff qualifies for the protection that this subsection provides. She has filed a complaint pursuant to 20 U.S.C. § 1415(b)(1)(E) requesting a hearing and a review of her special education placement. Moreover, there has been no agreement to leave her present special education placement voluntarily. Thus, plaintiff has a right to remain in this placement until her complaint is resolved. The novel issue raised by plaintiff arises from the fact that the right to remain in her present placement directly conflicts with Danbury High School's disciplinary process. If the high school expels plaintiff during the pendency of her special education complaint, then her placement will be changed in contravention of 20 U.S.C. § 1415(e)(3). The Court must determine whether this subsection of the Handicapped Act prohibits the expulsion of handicapped children during the pendency of a special education complaint.

[4] This is a case of first impression. Although there are no decisions in which the relation between the special education processes and disciplinary procedures is discussed, the regulations promulgated under the new law are helpful. The Department of Health, Education and Welfare (HEW) released regulations in August of this year that are aimed at facilitating the implementation of the Handicapped Act. *See* 42 Fed.Reg. 42,473 (1977) (to be codified in 45

4. The terms "suspension" and "expulsion" are used in accordance with the definitions appearing in Conn.Gen.Stat. § 10-233a(c), (d):

> (c) Suspension means an exclusion from school privileges for no more than ten consecutive school days, provided such exclusion shall not extend beyond the end of the school year in which such suspension was imposed.
>
> (d) Expulsion means an exclusion from school privileges for more than ten consecutive days and shall be deemed to include, but not be limited to, exclusion from the school to which such pupil was assigned at the time such disciplinary action was taken, provided such exclusion shall not extend beyond the end of the school year in which such exclusion was imposed.

This decision in no way affects the "removal" of students for all or part of a single class period. *See* Conn.Gen.Stat. § 10-233a(b).

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C.F.R. § 121a). Contained therein is a comment addressing the conflict between 20 U.S.C. § 1415(e)(3) and the disciplinary procedures of public schools: The comment reiterates the rule that after a complaint proceeding has been initiated, a change in a child's placement is prohibited. It then states: "While the placement may not be changed, this does not preclude a school from using its normal procedures for dealing with children who are endangering themselves or others." 42 Fed.Reg. 42,473, 42,496 (1977) (to be codified in 42 C.F.R. § 121a.513). This somewhat cryptic statement suggests that subsection 1415(e)(3) prohibits disciplinary measures which have the effect of changing a child's placement, while permitting the type of procedures necessary for dealing with a student who appears to be dangerous. This interpretation is supported by a comment-to-the-comment which states that the comment was added to make it clear that schools are permitted to use their regular procedures for dealing with emergencies.[5] *See* 42 Fed. Reg. 42,473, 42,512 (1977) (to follow the codification at 45 C.F.R. § 121a.513). There is no indication in either the regulations or the comments thereto that schools should be permitted to expel a handicapped child while a special education complaint is pending.

The Court concurs with HEW's reading of subsection 1415(e)(3). As will be discussed, the Handicapped Act establishes procedures which replace expulsion as a means of removing handicapped children from school if they become disruptive. Furthermore, school authorities can deal with emergencies by suspending handicapped children. Suspension will permit the child to remain in his or her present placement, but will allow schools in Connecticut to exclude a student for up to ten consecutive school days. *See* Conn.Gen. Stat. § 10-233a(c) and note 3 *supra*. Therefore, plaintiff's expulsion prior to the resolution of her complaint would violate the Handicapped Act.

Plaintiff makes a third claim that the Handicapped Act prohibits her expulsion even after her complaint proceedings have terminated. She bases this claim on her right to an education in the "least restrictive environment" and on the overall design of the Handicapped Act. An important feature of the Handicapped Act is its requirement that children be educated in the "least restrictive environment." This requirement entitles handicapped children to be educated with nonhandicapped children whenever possible. *See* 20 U.S.C. § 1412(5)(B); 42 Fed.Reg. 42,473, 42,497, 42,513 (1977) (to be codified in 45 C.F.R. § 121a.550). The right of handicapped children to an education in the "least restrictive environment" is implemented, in part, by requiring schools to provide a continuum of alternative placements. *See* 20 U.S.C. § 1412(5)(B); 42 Fed.Reg. 42,473, 42,497 (1977) (to be codified in 45 C.F.R. § 121a.551). These alternatives include instruction in regular classes, special classes, private schools, the child's home and other institutions. By providing handicapped children with a range of placements, the Handicapped Act attempts to insure that each child receives an education which is responsive to his or her individual needs while maximizing the child's opportunity to learn with nonhandicapped peers. *See* 42 Fed.Reg. 42,473, 42,497 (1977) (to be codified in 45 C.F.R. § 121a.552).

The right to an education in the least restrictive environment may be circumvented if schools are permitted to expel handicapped children. An expulsion has the ef-

5. The complete text of the comment-to-the-comment states:

> Commenters suggested a provision be added to allow change of placement for health or safety reasons. One Commenter requested that the regulations indicate that suspension not be considered a change in placement. Another commenter wanted more specificity to make it clear that where an initial placement is involved, the child be placed in the regular education program or if the parents agree, in an interim special placement.
>
> *Response*: A comment has been added to make it clear that this section would not preclude a public agency from using its regular procedures for dealing with emergencies. 42 Fed.Reg. 42,473, 42,512 (1977) (to follow codification at 45 C.F.R. § 121a.513).

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fect not only of changing a student's placement, but also of restricting the availability of alternative placements. For example, plaintiff's expulsion may well exclude her from a placement that is appropriate for her academic and social development. This result flies in the face of the explicit mandate of the Handicapped Act which requires that all placement decisions be made in conformity with a child's right to an education in the least restrictive environment. *See* 42 Fed.Reg. 42,473, 42,497 (1977) (to be codified in 45 C.F.R. § 121a.533(a)(4)).

[5] The expulsion of handicapped children not only jeopardizes their right to an education in the least restrictive environment, but is inconsistent with the procedures established by the Handicapped Act for changing the placement of disruptive children. The Handicapped Act prescribes a procedure whereby disruptive children are transferred to more restrictive placements when their behavior significantly impairs the education of other children. *See* 42 Fed.Reg. 42,473, 42,497 (1977) (to be codified in 45 C.F.R. § 121a.552).[6] The responsibility for changing a handicapped child's placement is allocated to professional teams, such as Connecticut's PPTs. *See* 42 Fed.Reg. 42,473, 42,497 (1977) (to be codified in 45 C.F.R. § 121a.533(a)(3)). Furthermore, parents of handicapped children are entitled to participate in and to appeal from these placement decisions. *See* 42 Fed.Reg. 42,473, 42,490 (1977) (to be codified in 45 C.F.R. § 121a.345); 20 U.S.C. § 1415(b)(1)(C), (c). Thus, the use of expulsion proceedings as a means of changing the placement of a disruptive handicapped child contravenes the procedures of the Handicapped Act. After considerable reflection the Court is persuaded that any changes in plaintiff's placement must be made by a PPT after considering the range of available placements and plaintiff's particular needs.

[6] It is important that the parameters of this decision are clear. This Court is cognizant of the need for school officials to be vested with ample authority and discretion. It is, therefore, with great reluctance that the Court has intervened in the disciplinary process of Danbury High School. However, this intervention is of a limited nature. Handicapped children are neither immune from a school's disciplinary process nor are they entitled to participate in programs when their behavior impairs the education of other children in the program. First, school authorities can take swift disciplinary measures, such as suspension, against disruptive handicapped children. Secondly, a PPT can request a change in the placement of handicapped children who have demonstrated that their present placement is inappropriate by disrupting the education of other children. The Handicapped Act thereby affords schools with both short-term and long-term methods of dealing with handicapped children who are behavioral problems.

[7, 8] Defendants contend that their disciplinary procedures are beyond the purview of this Court. They are mistaken. It has long been fundamental to our federalism that public education is under the control of state and local authorities. *See Epperson v. Arkansas*, 393 U.S. 97, 104, 89 S.Ct. 266, 21 L.Ed.2d 228 (1968); *Buck v. Board of Education of City of New York*, 553 F.2d 315, 320 (2d Cir. 1977). Although there is little doubt that the judgment of state and local school authorities is entitled to considerable deference, it is equally clear that even a school's disciplinary procedures are subject to the scrutiny of the federal judiciary. *See e. g., Goss v. Lopez*, 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1974); *Tinker v. Des Moines School Dist.*, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969); *Board of Educ. v. Barnette*, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1942). *Cf. Yoo v. Moynihan*, 28 Conn.Sup. 375, 262 A.2d 814 (1969) (temporary injunction issued by state

6. The comment to 45 C.F.R. § 121a.552 explains that a handicapped child's placement is inappropriate whenever the child becomes so disruptive that the "education of other students is significantly impaired." This explanation is derived from a comment to the Rehabilitation Act of 1973, 29 U.S.C. § 794. *See* 42 Fed.Reg. 22,676, 22,691 (1977) (to follow codification in 45 C.F.R. § 84.34).

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court against expulsion of student for violation of dress code). In the instant case, judicial intervention in Danbury High School's disciplinary procedures is Congressionally mandated. The Handicapped Act vests jurisdiction in federal district courts over all claims of noncompliance with the Act's procedural safeguards, regardless of the amount in controversy. *See* 20 U.S.C. § 1415(e)(4).

Defendants' principle objection to the issuance of a preliminary injunction is that the procedures for securing a special education are distinct from disciplinary procedures and therefore one process should not interfere with the other. This contention is based on a non sequitur. The inference that the special education and disciplinary procedures cannot conflict, does not follow from the premise that these are separate processes. Defendants are really asking the Court to refuse to resolve an obvious conflict between these procedures. This Court will not oblige them.

Danbury Board of Education is HEREBY ORDERED to require an immediate PPT review of plaintiff's special education program and is preliminarily enjoined from conducting a hearing to expel her. Furthermore, any changes in her placement must be effectuated through the proper special education procedures until the final resolution of plaintiff's claims.

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S-1, a minor, by and through his mother and next friend, P-1 *et al.*,
Plaintiffs-Appellees

v.

RALPH D. TURLINGTON, individually, and in his official capacity as Commissioner of Education, State of Florida, Department of Education *et al.*,
Defendants-Appellants

No. 79-2742

United States Court of Appeals, Fifth Circuit. Unit B

January 26, 1981

Appeals from the United States District Court for the Southern District of Florida

Before Vance, Hatchett and Anderson, Circuit Judges

Hatchett, Circuit Judge

Appeal from entry of preliminary injunction by District Court for the Southern District of Florida, 3 EHLR 551:211 [1979-80 DEC.], compelling State and local officials to provide educational services and procedural rights provided by EHA to students expelled for misconduct.

HELD, since trial court did not abuse its discretion in entering the preliminary injunction, its decision is affirmed. Before a handicapped student can be expelled, a trained and knowledgeable group of persons must determine whether the student's misconduct bears a relationship to his handicapping condition. An expulsion is a change in educational placement which invokes the procedural protections of EHA and § 504. Expulsion is a proper disciplinary tool under EHA and § 504, but a complete cessation of educational services is not. EHA, 20 U.S.C. § 1415(b), requirement that parents have an opportunity for due process hearing makes no exception for handicapped students who voluntarily withdraw from school or previously agree to an educational placement. State officials were properly included within scope of injunction since, under EHA, 20 U.S.C. § 1412(6), SEA is responsible for ensuring implementation of EHA and expulsion proceedings may deny benefits of EHA to children entitled to education under Act.

In this appeal, we are called upon to decide whether nine handicapped students were denied their rights under the provisions of the Education for all Handicapped Children Act, 20 U.S.C. §§ 1401-1415, or Section 504 of the Rehabilitation Act of 1973, codified at 29 U.S.C. § 794 and their implementing regulations. The trial court found a denial of rights and entered a preliminary injunction against the State and local officials. Defendants attack the trial court's entry of a preliminary injunction as an abuse of discretion. Because we find that the trial court did not abuse its discretion in entering the preliminary injunction, we affirm.

FACTS

Plaintiffs, S-1, S-2, S-3, S-4, S-5, S-6, and S-8, were expelled from Clewiston High School, Hendry County, Florida, in the early part of the 1977-78 school year for alleged misconduct.[1] Each was expelled for the remainder of the 1977-78 school year and for the entire 1978-79 school

[1] The misconduct upon which the expulsions were based ranged from masturbation and other sexual acts against fellow students to willful defiance of authority, insubordination, vandalism, and the use of profane language.

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year, the maximum time permitted by State law. All of the plaintiffs were classified as either educable mentally retarded (EMR), mildly mentally retarded, or EMR/dull normal. It is undisputed that the expelled plaintiffs were accorded the procedural protections required by *Goss v. Lopez*, 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975). Except for S-1, they were not given, nor did they request, hearings to determine whether their misconduct was a manifestation of their handicap. Regarding S-1, the superintendent of Hendry County Schools determined that because S-1 was not classified as seriously emotionally disturbed, his misconduct, as a matter of law, could not be a manifestation of his handicap.

At all material times, plaintiffs S-7 and S-9 were not under expulsion orders. S-7 was not enrolled in high school by his own choice. In October, 1978, he requested a due process hearing to determine if he had been evaluated or if he had an individualized educational program. S-9 made a similar request in October, 1978. Shortly before her request, S-9's guardian had consented to the individualized education program being offered her during that school year. The superintendent denied both student's requests, but offered to hold conferences in order to discuss the appropriateness of their individualized educational programs.

Plaintiffs initiated this case alleging violations of their rights under the Education for all Handicapped Children Act, (EHA) 20 U.S.C. §§ 1401-1415, and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794. Plaintiffs sought preliminary and permanent injunctive relief compelling state and local officials to provide them with the educational services and procedural rights required by the EHA, Section 504, and their implementing regulations.

TRIAL COURT DECISION

The trial court found that the EHA, effective in Florida on September 1, 1978, provided all handicapped children the right to a free and appropriate public education. The court further found that the expelled students were denied this right in violation of the EHA. In addition, the trial court decided that under Section 504 and the EHA, no handicapped student could be expelled for misconduct related to the handicap. That in the case of S-2, S-3, S-4, S-5, S-6, and S-8, no determination was ever made of the relationship between their handicaps and their behavioral problems. With regard to S-1, the trial court found that the superintendent's determination was insufficient under Section 504 and the EHA. The court reasoned that an expulsion is a change in educational placement. That under educational placement procedures of Section 504 and the EHA, only a trained and specialized group could make this decision. For these reasons, the trial court concluded that the likelihood of success on the merits had been shown with respect to the expelled plaintiffs.

With regard to S-7 and S-9, the trial court stated that under 20 U.S.C. § 1415(b)(1)(E),[2] students and their parents or guardians must be provided "an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate education to such child." That under 20 U.S.C. § 1415(b)(2),[3] "whenever such a complaint has been received, the parents or guardians shall have an opportunity for an impartial due process hearing." The trial court found that the superintendent's failure to grant S-7 and S-9 impartial due process hearings contravened the express provisions of the EHA. The court therefore concluded that S-7 and S-9 had shown a likelihood of success on the merits of their claim.

Finally, the trial court found that the plaintiffs had suffered irreparable harm in that two years of education had been irretrievably lost. The court further determined that an injunction was necessary to ensure that plaintiffs would be provided their rights, even though the expulsions had expired at the time the injunction was entered.

STATEMENT OF ISSUES

In an appeal from an order granting preliminary relief, the applicable standard of review is whether the issuance of the injunction, in light of the applicable standard, constitutes an abuse of discretion.[4] *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 95 S.Ct. 2561, 45 L.Ed.2d 648 (1975); *Canal Authority of State of Florida*, 489 F.2d 567 (5th Cir. 1974). Therefore, in order to decide whether the trial court abused its discretion in entering the preliminary injunction, we must resolve the following issues: (1) whether an expulsion is a change in educational placement thereby invoking the procedural protections of the EHA and Section 504; (2) whether the EHA, Section 504, and their implementing regulations contemplate a dual system of discipline of handicapped and nonhandicapped students; (3) whether the burden of raising the question whether a student's misconduct is a manifestation of the student's handicap, is on the State and local officials or on the student; (4) whether the EHA and its implementing regulations required the local defendants to grant S-7 and S-9 due process hearings; and (5) whether the trial judge properly entered the preliminary injunction against the State defendants.

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[2] 20 U.S.C. § 1415(b)(1)(E) provides:

> (b)(1) The procedures required by this section shall include, but shall not be limited to:
>
> (E) an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.

[3] 20 U.S.C. § 1415(b)(2) provides:

> (2) Whenever a complaint has been received under paragraph (1) of this subsection, the parents or guardian shall have an opportunity for an impartial due process hearing which shall be conducted by the State educational agency. No hearing conducted pursuant to the requirements of this paragraph shall be conducted by an employee of such agency or unit involved in the education or care of the child.

[4] Prerequisites for granting of a preliminary injunction are: (1) substantial likelihood that plaintiff will prevail on the merits; (2) substantial threat that plaintiff will suffer irreparable injury if injunction is not granted; (3) threatened injury to plaintiff outweighing threatened harm injunction may do to defendants; and, (4) absence of disservice to the public interest if the injunction should be granted. Defendants only seriously challenge the trial court's findings regarding the first two prerequisites. Accordingly, we confine our discussion to those elements.

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DISCUSSION

Section 504 of the Rehabilitation Act and the EHA have been the subject of infrequent litigation. No reported appellate cases deal with these acts and the issues presented in the instant case. Therefore, a review of these statutes and their pertinent regulations is necessary to the disposition of this controversy.

Section 504, effective in Florida four months prior to the expulsions in question, provides:

> No otherwise qualified handicapped individual in the United States, as defined in Section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . .

Under 29 U.S.C. § 706(7)(B), a *handicapped* individual is defined as "any person who (1) has a physical or mental impairment which substantially limits one or more of such person's major life activities . . ."

Under the EHA, 20 U.S.C. § 1412(1)[3] and (5)(B),[4] effective in Florida on September 1, 1978, a State receiving financial assistance under this Act is required to provide all *handicapped* children a free and appropriate education in the least restrictive environment. The definition of *handicapped* children under the EHA is similar to the definition under Section 504.

Florida, and the Hendry County School Board, are recipients of Federal funds under both Section 504 and the EHA. The children in this suit are clearly handicapped within the meaning of both Section 504 and EHA. The parties agree that a handicapped student may not be expelled for misconduct which results from the handicap itself. It follows that an expulsion must be accompanied by a determination as to whether the handicapped student's misconduct bears a relationship to his handicap. From a practical standpoint, this is the only logical approach. How else would a school board know whether it is violating Section 504?

Defendant local officials argue that they complied with Section 504. As support for their position, they state that they determined, in the expulsion proceedings, that the plaintiffs were capable of understanding rules and regulations or right from wrong. They also assert that they found, based upon a psychological evaluation, that plaintiffs' handicaps were not behavioral handicaps (as it would be if plaintiffs were classified as seriously emotionally disturbed), thereby precluding any relationship between the misconduct and the applicable handicap. We cannot agree that consideration of the above factors satisfies the requirement of Section 504. A determination that a handicapped student knew the difference between right and wrong is not tantamount to a determination that his misconduct was or was not a manifestation of his handicap. The second prong of the school officials' argument is unacceptable. Essentially, what the school officials assert is that a handicapped student's misconduct can never be a symptom of his handicap, unless he is classified as seriously emotionally disturbed. With regard to this argument, the trial court stated:

> The defendants concede that a handicapped student cannot be expelled for misconduct which is a manifestation of the handicap itself. However, they would limit application of this principle to those students classified as "seriously emotionally disturbed." In the Court's view such a generalization is contrary to the emphasis which Congress has placed on individualized evaluation and consideration of the problems and needs of handicapped students.

We agree. In addition, the uncontradicted testimony elicited at the preliminary injunction hearing suggests otherwise. At the hearing, a psychologist testified that a connection between the misconduct upon which the expulsions were based and the plaintiffs' handicaps may have existed. She reasoned that "a child with low intellectual functions and perhaps the lessening of control would respond to stress or respond to a threat in the only way that they feel adequate, which may be verbal aggressive behavior." She further testified that an orthopedically handicapped child, whom she had consulted,

> [w]ould behave in an extremely aggressive way towards other children and provoke fights despite the fact that he was likely to come out very much on the short end of the stick. That this was his way of dealing with stress and dealing with a feeling of physical vulnerability. He would be both aggressive and hope that he would turn off people and as a result provoke an attack on him.

The record clearly belies the school officials' contention.

First Issue

With regard to plaintiff S-1, the trial court found that the school officials entrusted with the expulsion decision deter-

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[3] 20 U.S.C. § 1412(1) provides:

> In order to qualify for assistance under this subchapter in any fiscal year, a State shall demonstrate to the Commissioner that the following conditions are met:
>
> (1) The State has in effect a policy that assures all handicapped children the right to a free appropriate public education.

[4] 20 U.S.C. § 1412(5)(B) provides:

> In order to qualify for assistance under this subchapter in any fiscal year, a State shall demonstrate to the Commissioner that the following conditions are met:
>
> (5) The State has established . . . (B) procedures to assure that, to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and that special classes, separate schooling, or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily[.]

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mined at the disciplinary proceedings that S-1's misconduct was unrelated to his handicap. The trial court, however, held that this determination was made by school board officials who lacked the necessary expertise to make such a determination. The trial court arrived at this conclusion by holding that an expulsion is a change in educational placement. Under 45 C.F.R. § 121a.533(a)(3)[7] and 45 C.F.R. § 84.35(c)(3),[8] evaluations and placement decisions must be made by a specialized and knowledgeable group of persons.

The trial court's finding presents the novel issue in this circuit whether an expulsion is a change in educational placement, thereby invoking the procedural protections of both the EHA and Section 504 of the Rehabilitation Act. In deciding this issue, the EHA and Section 504, as remedial statutes, should be broadly applied and liberally construed in favor of providing a free and appropriate education to handicapped students.

The EHA, Section 504, and their implementing regulations do not provide this court any direction on this issue. We find the reasoning of the district court in *Stuart v. Nappi*, 443 F. Supp. 1235 (D. Conn. 1978), persuasive. In *Stuart*, a child was diagnosed as having a major learning disability caused by either a brain disfunction or a perceptual disorder. She challenged the use of disciplinary proceedings which, if completed, would have resulted in her expulsion for participating in a schoolwide disturbance. The trial court held that the proposed expulsion constituted a change in educational placement, thus requiring the school officials to adhere to the procedural protections of the EHA. In so holding, the court stated:

> The right to an education in the least restrictive environment may be circumvented if schools are permitted to expel handicapped children [without following the procedures prescribed by the EHA] . . . An expulsion has the effect not only of changing a student's placement, but also of restricting the availability of alternative placements. For example, plaintiff's expulsion may well exclude her from a placement that is appropriate for her academic and social development. This result flies in the face of the explicit mandate of the handicapped act which requires that all placement decisions be made in conformity with a child's right to an education in the least restrictive environment. [Citation omitted.]

443 F. Supp. at 1242-43.

We agree with the district court in *Stuart*, and therefore hold that a termination of educational services, occasioned by an expulsion, is a change in educational placement thereby invoking the procedural protections of the EHA.

The proposition that an expulsion is a change in educational placement has been cited with approval in *Sherry v. New York State Education Department*, 479 F. Supp. 1328 (W.D. N.Y. 1979) (legally blind and deaf student that suffered from brain damage and emotional disorder which made her self abusive suspended because of insufficient staff to care for her), and *Doe v. Koger*, 480 F. Supp. 225 (N.D. Ind. 1979) (EHA case in which mildly mentally handicapped student was expelled for the remainder of school term for disciplinary reasons pursuant to the procedures provided for all Indiana public school disciplinary expulsions). As stated by the district court in *Doe v. Koger*, our holding that expulsion of a handicapped student constitutes a change in educational placement distinguishes the handicapped student in that, "unlike any other disruptive child, before a disruptive handicapped child can be expelled, it must be determined whether the handicap is the cause of the child's propensity to disrupt. This issue must be determined through the change of placement procedures required by the handicapped act." *Doe v. Koger*, 480 F. Supp. at 229.[9]

Second Issue

The school officials point out that a group of persons entrusted with the educational placement decision could never decide that expulsion is the correct placement for a handicapped student, thus insulating a handicapped student from expulsion as a disciplinary tool. They further state that Florida law does not contemplate this result because expulsion is specifically provided for under Florida law as a disciplinary tool for all students. While the trial court declined to decide the issue whether a handicapped student can ever be expelled, we cannot ignore the gray areas that may result if we do not decide this question. We therefore find that expulsion is still a proper disciplinary tool under the EHA and Section 504 when proper procedures are utilized and under proper circumstances. We cannot, however, authorize the complete cessation of educational services during an expulsion period.

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[7] 45 C.F.R. § 121a.533(a)(3) provides in pertinent part that:

> (a) In interpreting evaluation data and in making placement decisions, each public agency shall:
>
> (3) insure that the placement decision is made by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options . . .

[8] 45 C.F.R. § 84.35(c)(3) provides in pertinent part that:

> (c) In interpreting evaluation data and in making placement decisions, a recipient shall (3) ensure that the placement decision is made by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options.

[9] This opinion does not infringe upon the traditional authority and responsibility of the local school board to ensure a safe school environment. A comment to the regulations provides: "While the placement may not be changed, this does not preclude dealing with children who are endangering themselves or others." 45 C.F.R. § 121a.513 (comment). Thus the local school board retains the authority to remove a handicapped child from a particular setting upon a proper finding that the child is endangering himself or others. In such case, the child would of course be remanded to the special change of placement procedures for reassignment to an appropriate placement. It is appropriate to superimpose this very limited authority, as contemplated by the above quoted comment, because nothing in the statute, the regulations, or the legislative history suggests that Congress intended to remove from local school boards—who alone are accountable to the entire school community—their long-recognized authority and responsibility to ensure a safe school environment.

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Third Issue

State defendants focus their attention on the fact that, with the exception of S-1, none of the expelled plaintiffs raised the argument, until eleven months after expulsion, that they could not be expelled unless the proper persons determined that their handicap did not bear a causal connection to their misconduct. By this assertion, we assume that State defendants contend that the handicapped students waived their right to this determination. The issue is therefore squarely presented whether the burden of raising the question whether a student's misconduct is a manifestation of the student's handicap is on the State and local officials or on the student. The EHA, Section 504, and their implementing regulations do not prescribe who must raise this issue. In light of the remedial purposes of these statutes, we find that the burden is on the local and State defendants to make this determination. Our conclusion is buttressed by the fact that in most cases, the handicapped students and their parents lack the wherewithal either to know or to assert their rights under the EHA and Section 504.

Fourth Issue

The next issue is whether the EHA and its implementing regulations required the local defendants to grant S-7 and S-9 due process hearings. School officials suggest that because S-7 and S-9 had voluntarily withdrawn from school, they were not entitled to due process hearings. They also suggest that the conference offered by the superintendent was an adequate substitute for the due process hearings. They cite 45 C.F.R. 121a.506[10] as support for their argument. Under this regulation, the Department of Health, Education, and Welfare (HEW) (Health and Human Resources), states in a comment that mediation can be used to resolve differences between parents and agencies without the development of an adversarial relationship. The Justice Department, as *amicus curiae*, and the trial court, point out that under 20 U.S.C. § 1415(b)(1), parents and guardians of handicapped children must have "an opportunity to present complaints with respect *to any matter* relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child." The statute also states, in Section 1415(b), that "whenever a complaint has been received under paragraph (1) of this subsection, the parents or guardian shall have an opportunity for an impartial due process hearing . . ." No exception is made for handicapped students who voluntarily withdraw from school or previously agree to a new educational placement. With regard to defendants' argument under 45 C.F.R. § 121a.506, HEW states in the same comment that mediation may not be used to deny or delay a parent's rights under this subpart. In the circumstances, the trial judge correctly found that plaintiffs S-7 and S-9 were entitled to due process hearings.

Fifth Issue

State defendants advance three arguments that deserve comment. First, they assert that the trial judge erred in analyzing Section 504 in light of the Supreme Court's decision in *Southeastern Community College v. Davis*, 442 U.S. 397, 99 S.Ct. 2361, 60 L.Ed.2d 980 (1979). In that case, the issue was whether Section 504, which prohibits discrimination against an otherwise qualified handicapped individual enrolled in a Federally funded program, solely by reason of his handicap, forbids professional schools from imposing physical qualifications for admission to their clinical training program. The Supreme Court held that Section 504 did not forbid professional schools from imposing physical qualifications for admission. Without discussing *Southeastern* any further, it is clear that it does not apply to this case. Physical qualifications are not at issue in this case. Furthermore, we do not deal here with a professional school.

Secondly, State defendants argue that the trial court erred in imposing the EHA as a requirement at the time of the expulsions because the EHA was not effective in Florida until September 1, 1978. The trial court did not impose the EHA as a requirement at the time of the expulsion. The court found that the expelled plaintiffs became entitled to the protections of the EHA on September 1, 1978. As such, the expelled plaintiffs became entitled to a free and appropriate education in the least restrictive environment. In fact, under 20 U.S.C. § 1412(3),[11] because plaintiffs were not receiving educational services on September 1, 1978, they fell within a special class of handicapped students entitled to priority regarding the provision of a free and appropriate education. The only way in which the expulsions could have continued as of September 1, 1978, is if a qualified group of individuals determined that no relationship existed between the plaintiffs' handicap and their misconduct. Furthermore, Section 504, effective at the time of the expulsions, provides protections and procedures similar to those of the EHA. *See, North v. District of Columbia Board of Education*, 471 F. Supp. 136 (D. D.C. 1979).

Finally, the State officials argue that the trial court improperly entered the injunction against them. They assert

[10] The comment to 45 C.F.R. 121a.506 implementing 20 U.S.C. § 1416(b)(2) provides:

> *Comment*: Many States have pointed to the success of using mediation as an intervening step prior to conducting a formal due process hearing. Although the process of mediation is not required by the statute or these regulations, an agency may wish to suggest mediation in disputes concerning the identification, evaluation, and educational placement of handicapped children, and the provision of a free appropriate public education to those children. Mediations have been conducted by members of State educational agencies or local educational agency personnel who were not previously involved in the particular case. In many cases, mediation leads to resolution of differences between parents and agencies without the development of an adversarial relationship and with minimal emotional stress. However, mediation may not be used to deny or delay a parent's rights under this subpart.

[11] 20 U.S.C. § 1412(3) provides in pertinent part that:

> In order to qualify for assistance under this subchapter in any fiscal year, a State shall demonstrate to the Commissioner that the following conditions are met:
>
> (3) The State has established priorities for providing a free appropriate public education to all handicapped children . . . first with respect to handicapped children who are not receiving an education[.]

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that they lacked the authority to intervene in the expulsion proceedings because disciplinary matters are exclusively local. While this argument may be true regarding nonhandicapped students, it is inapplicable to handicapped students. Expulsion proceedings are of the type that may serve to deny an education to those entitled to it under the EHA. Under 20 U.S.C. § 1412(6), the State educational agency is:

> [R]esponsible for assuring that the requirements of this subchapter be carried out and that all educational programs for handicapped children within the State, including all such programs administered by any other State or local agency, will be under the general supervision of the persons responsible for educational programs for handicapped children in the State educational agency and shall meet educational standards of the State educational agency.

Clearly, the state officials were empowered to intervene in the expulsion proceedings under 20 U.S.C. § 1412(6).

CONCLUSION

Accordingly, we hold that under the EHA, Section 504, and their implementing regulations: (1) before a handicapped student can be expelled, a trained and knowledgeable group of persons must determine whether the student's misconduct bears a relationship to his handicapping condition; (2) that an expulsion is a change in educational placement thereby invoking the procedural protections of the EHA and Section 504; (3) that expulsion is a proper disciplinary tool under the EHA and Section 504, but a complete cessation of educational services is not; (4) that S-7 and S-9 were entitled to due process hearings; and (5) the trial judge properly entered the preliminary injunction against the State defendants. In the circumstances, the trial judge did not abuse his discretion in entering the injunction.

AFFIRMED.

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APPENDIX E

SUMMARY OF OCR COMPLAINTS LOFS

APPENDIX E

SUMMARY OF OCR COMPLAINTS LOFS

Community (IL) Unit School District Number 300
March 19, 1980

Complaint alleged school district denied handicapped student FAPE as result of expulsion. District took position that behavior of student which led to expulsion (vandalizing school buses) had nothing to do with his exceptionality, that he had been totally mainstreamed and should be treated as a regular student.

HELD, expulsion of student resulted in total denial of FAPE. District violated Section 504 by not timely reevaluating student before expulsion. Under Reg. 121a.534(b), an LEA must reevaluate at least every three years, upon parental or teacher request, or when warranted. Since student had not been reevaluated prior to expulsion, which constituted significant change in placement, district had no data upon which to base an appropriate placement or its assertion that student's behavior had nothing to do with his handicap. The expulsion hearing held *prior* to the expulsion did not meet due process requirements of Section 504. Parents must be provided an opportunity for due process hearing *after* reevaluation if dissatified with placement. District's contention that student had been totally mainstreamed due to removal from L.D. resource services was without merit due to fact district failed to conduct an evaluation before discontinuing service. Reg. 84.35(a) OCR additionally found that IEP developed for student did not contain statement of short-term instructional goals as required by Reg. 121a.346, and that district had not provided student with counselling services set forth in first evaluation. District was requested to reevaluate student's placement, revise its suspension and expulsion procedures, and assure that student would receive tutoring for time lost by expulsion.

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Corinth Municipal Separate School District
June 6, 1980

Parent alleged that school district discriminated against student on basis of race and handicap in administration of disciplinary sanctions.

HELD, although allegation of racial discrimination could not be substantiated, school district violated § 504 in its evaluation, placement, and suspension of student. First, district identified student as having possible handicapping condition in November, 1978 but failed to initiate required preplacement evaluation until one year later, not a "reasonable time" under § 504. Second, student was temporarily placed in EMR program, as alternative to more severe disciplinary action, without preparation of preplacement evaluation or IEP. By moving student from regular class to EMR program without taking appropriate procedural safeguards, district could not determine whether EMR class would be least restrictive environment for pupil. Third, district assumed student was handicapped by placing him in EMR class. Therefore, by suspending student subsequent to that placement, and subsequent to his identification as qualified handicapped student in 1978, district violated § 504 and State procedural safeguards; under State law, district was prohibited from suspending any handicapped student for more than three days, and then only if behavior constituted a threat to others or an emergency, while under § 504 district was obligated to determine whether behavior leading to suspension was related to handicap and whether current placement and subsequent removal were appropriate. Moreover, district violated § 504 by failing to notify parent of right to challenge suspension through due process hearing. To remedy violations, district was advised to evaluate and reinstate student, provide for parent's participation in evaluation and placement, and provide compensatory assistance, including tutorial and summer programs, to overcome effects of discrimination.

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Fayette (MO) R-III School District
October 18, 1978

Complainant alleged that eighth-grade child was denied a free and appropriate public education when LEA failed to acknowledge child's handicap and provide educational program suitable to his needs, and then expelled him from school for disruptive behavior. Complainant further maintained that expulsion hearing denied child appropriate due process under § 504.

HELD, LEA violated § 504 and Reg. 84.33 by failing to make any attempt to identify child's special education needs or recommend appropriate placement, in spite of clear and available evidence that child was handicapped as defined under Reg. 84.3(j) and that child's academic and behavioral problems were related to this handicap. LEA further violated § 504 and Reg. 84.36, as interpreted in OCR Policy Interpretation No. 6, when it expelled child from school without providing either an impartial hearing or due process review procedures. Compliance with EHA, 20 U.S.C. § 1415 is one means by which LEA can meet § 504 due process requirements.

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Lower Snoqualmie Valley School District No. 407
September 24, 1980

Official with Washington Association for Children with Learning Disabilities brought complaint which alleged school district violated § 504 by: (1) requiring students to participate in Saturday Alternative-to-Suspension Program when such program was not included in IEPs, (2) making access to student records contingent on paying fee, (3) taking retaliatory action against handicapped students by suspending them in direct relation to parents seeking their rights, (4) suspending/expelling students without taking into consideration handicapping condition, (5) failing to notify parents of district's duty to provide FAPE and ignoring requests for due process hearings and (6) failing to follow required evaluation and placement procedures.

HELD, investigation of first three allegations showed no violation of § 504 because (1) evidence demonstrated parents' awareness that Saturday Alternative-to-Suspension Program was optional, not required; (2) fees charged parents were for copies of records, not for right to inspect files; and (3) OCR could not corroborate that district was suspending students in direct relation to parents seeking their rights. However, because it was impossible for OCR to determine whether violation occurred since district destroyed discipline records at end of year, district was advised to retain files for at least three years in order to meet § 504 requirements. OCR did find that district violated § 504 by: (4) not differentiating between handicapped and nonhandicapped students in terms of suspension and corporal punishment; OCR informed district it had to include in its discipline procedures a process for determining whether student's inappropriate behavior leading to suspension or punishment was caused by a handicap; (5) failing to notify parents on at least an annual basis of its duty to provide a FAPE, requiring mediation before scheduling due process hearings, and (6) failing to properly implement IEPs and failing to provide parental notification of procedual safeguards concerning evaluation and placement.

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Seattle (WA) School District No. 1
October 16, 1980

Complainant alleged that school district violated § 504 because of its suspension and expulsion procedures for handicapped students.

HELD, district violated § 504 by suspending/expelling 323 special education students during 1977-78 and 1978-79 school years for indefinite periods of time without first conducting a placement evaluation and preplacement conference or providing due process safeguards. Investigation indicated that district's policy called for pre-disciplinary conference to determine whether student's disruptive behavior was related to handicapping condition or result of inappropriate placement. However, procedure was insufficient to meet requirements of Reg. 104.35; 75 percent of students sampled were not provided appropriate evaluation conference while 25 percent were not provided any conference. Moreover, of 75 percent who did attend conference, in 40 percent of cases, no determination was made as to whether reason for expulsion was related to handicap and, in cases where it was determined that behavior was related to handicap, specific program changes recommended by conference participants were not implemented. On issue of due process safeguards, district failed to provide students and/or parents with advance notice that it was contemplating a placement change and, although all students or parents received written notice of district's intent to expel, none of notices indicated that student's removal from school constituted a placement change or that reevaluation and placement conferences had or had not taken place. District was advised to review its procedures; specifically, to respond to seriously disruptive behavior through use of emergency removals or short-term suspensions and to insure that student excluded for more than 10 days out of school year be reevaluated and placed as soon after removal as possible.

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APPENDIX F

OCR COMPLAINT LOFS: FULL TEXT

Community (IL) Unit School District Number 300
March 19, 1980

Complaint alleged school district denied handicapped student FAPE as result of expulsion. District took position that behavior of student which led to expulsion (vandalizing school buses) had nothing to do with his exceptionality, that he had been totally mainstreamed and should be treated as a regular student.

HELD, expulsion of student resulted in total denial of FAPE. District violated Section 504 by not timely reevaluating student before expulsion. Under Reg. 121a.534(b), an LEA must reevaluate at least every three years, upon parental or teacher request, or when warranted. Since student had not been reevaluated prior to expulsion, which constituted significant change in placement, district had no data upon which to base an appropriate placement or its assertion that student's behavior had nothing to do with his handicap. The expulsion hearing held *prior* to the expulsion did not meet due process requirements of Section 504. Parents must be provided an opportunity for due process hearing *after* reevaluation if dissatified with placement. District's contention that student had been totally mainstreamed due to removal from L.D. resource services was without merit due to fact district failed to conduct an evaluation before discontinuing service, Reg. 84.35(a). OCR additionally found that IEP developed for student did not contain statement of short-term instructional goals as required by Reg. 121a.346, and that district had not provided student with counselling services set forth in first evaluation. District was requested to reevaluate student's placement, revise its suspension and expulsion procedures, and assure that student would receive tutoring for time lost by expulsion.

Dr. Robert W. Trevarthen
Superintendent
Community Unit School
District No. 300
405 N. Sixth Street
Dundee, Illinois 60118

Re: V-80-1018

This is to inform you of our determination with respect to the complaint filed by Mrs. [ ] on behalf of her son Theodore [ ]. In that complaint Mrs. [ ] alleged that the Community Unit School District No. 300 (hereinafter referred to as the District) has denied Theodore, a special education student, a free appropriate education as a result of his expulsion. Reg. 84.33(a) of the regulations implementing Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, 45 C.F.R. Reg. 84.33(a) states that recipients:

> shall provide a free appropriate public education to each qualified handicapped person who is in the recipient's jurisdiction, regardless of the nature or severity of the person's handicap.

Similarly, Reg. 84.35(a) requires:

> a recipient that operates a public elementary or secondary education program shall conduct an evaluation of any person who, because of his handicap, needs or is believed to need special education or related services before taking *any action* with respect to the initial placement of the person in a regular or special education program and any *subsequent significant change in placement*. (Emphasis added.)

Pursuant to such enforcement responsibility, this Office conducted an investigation, which included information provided by your District and information gathered by a member of our staff during the on-site visit. As a result of this investigation, we have determined that the Dundee (Ill.) Community Unit School District is failing to comply with Section 504 of the Rehabilitation Act of 1973 regarding its provision of free appropriate educational services to Theodore and other handicapped students suspended/expelled without the procedural safeguards provided by Section 504. This letter sets forth a summary of our determinations.

I.
Evaluation Procedures

A. *Reevaluation*

Examination of Theodore's school records shows that Theodore has not been given an evaluation since February 28, 1976. Mrs. [ ] alleges that she has asked for a reevaluation on several occasions but that the District said she would have to pay for it. There is no written evidence to substantiate Mrs. [ ]'s request for a reevaluation.

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Reg. 84.35(d) of the Section 504 Regulations requires the Recipient to:

> provide periodic reevaluations of students who have been provided special education and related services. Reevaluation procedures consistent with the Education for the Handicapped Act (EHA), 20 U.S.C. § 1401 *et seq.*, is one means of meeting this requirement. (EHA's implementing Regulation requires that a reevaluation be given at least every 3 years or anytime at parental or teacher request or if warranted. (45 C.F.R. Reg. 121a.534(b))

Based on the above, the preponderance of the evidence established that the District has violated Reg. 84.35(d) by not providing Theodore [ ] a timely reevaluation. The District is required to evaluate handicapped children every 3 years; Theodore's last evaluation was over 3 years ago at the time of his suspension.

B. *Development of IEP*

Our investigation further revealed that Theodore [ ] was last provided an individualized educational program (IEP) April 8, 1979. In reviewing this IEP we found that it did not include a statement of short-term goals.

Section 1401(19) of the EHA defines and specifies the required contents of an IEP. An appropriate IEP must include:

> (A) a statement of present levels of educational performance of such child, (B) a statement of annual goals, including, short-term instructional objective, (C) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs, (D) the projected date for initiation and anticipated duration of such services, and (E) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved. (*See also* 45 C.F.R. Reg. 121a.346)

Section 9.18a(4) of The Illinois Rules and Regulations To Govern the Administration and Operation of Special Education at Section 9.18a(4) is identical to the above quoted section of EHA.

Reg. 84.33(b) of the Section 504 Regulations defines the appropriate education as the provision of regular or special education and related services that are designed to meet individual educational needs of handicapped persons as adequately as the needs of the nonhandicapped are met. Reg. 84.33(b)(2) states that one means of meeting this standard is implementation of an IEP developed in accordance with EHA. Where a district is providing services to a handicapped student pursuant to an IEP, and pursuant to the Illinois Special Education regulations, Section 504 compliance requires that the IEP conform to EHA requirements.

The IEP contained in the file of Theodore [ ], dated April 8, 1979, does not comply with the requirements of EHA in that it does not contain a statement of short-term instructional objectives. Therefore, it does not comply with the requirements of Section 504.

Based on the preponderance of the evidence as set forth above, we find the District in violation of Section 504 of the Rehabilitation Act of 1973 for not providing an appropriate IEP to Theodore [ ].

II.

Placement Procedures

A. *Placement Change Resulting from Mother's Request*

The School District has stated that Theodore has not been receiving Learning Disability (L.D.) Resource services since September, 1979 because of Mrs. [ ]'s verbal demand that Theodore not be required to attend. Mrs. [ ] concurred that she did want Theodore out of the L.D. Resource room because of his complaint that he was not receiving any instruction. There is nothing in Theodore's record to substantiate what Mrs. [ ]'s reasons were.

It should also be noted that according to the District's Special Education Department manual of page 42 (1979) a staffing is required before a change in placement. Reg. 84.35(a) of the Section 504 Regulations requires that before taking any action which amounts to a significant change in placement an evaluation must be conducted.

There is no evidence that the District conducted such an evaluation before discontinuing L.D. Resource services to Theodore [ ]. Upon discontinuance of these services Theodore [ ] no longer received any special education services. This constituted a significant change in placement, prior to which the District was required to conduct an evaluation. Therefore, the weight of the evidence establishes that the district violated Section 504 by not conducting an evaluation before discontinuing L.D. services to Theodore [ ]. (45 C.F.R. Reg. 84.35(a))

B. *Expulsion*

Theodore [ ], a sophomore student at Crown High School, was suspended on October 9, 1979 for vandalizing school buses on school property, which took place in September, 1979. Theodore was subsequently expelled on October 22, 1979 until September 1980. Until that time Theodore had been classified as a special education student, enrolled in the Learning Disabilities Resource program since 1976.

The District has justified Theodore's expulsion on the premises that Theodore's behavior had nothing to do with his exceptional characteristic (a minor auditory memory problem) and that the Illinois Rules and Regulations To Govern the Administration and Operation of Special Education intent is to establish parity between the handicapped and nonhandicapped students for behavior that they can control.

The District also took the position that Theodore was "totally mainstreamed," not using the L.D. Resource facility and should be treated the same as regular students.

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In analyzing the last contention of the District it should be noted that the fact that Theodore was no longer receiving L.D. Resource services did not change his Special Education classification. This classification cannot be changed prior to reevaluation determining that he no longer required such services. (*See* 45 C.F.R. Reg. 84.35(a)) Therefore, because he was still classified as a Special Education student, Theodore [ ] was entitled to a reevaluation before any significant change in placement.

Theodore's expulsion constituted a change in placement which resulted in a total denial of a free appropriate education. Before such a drastic change a reevaluation was required. Theodore was entitled to remain in his present placement (at the Crown High School) pending a reassessment or reevaluation of his special education needs.

The fact that an expulsion hearing was held prior to the expulsion does not discharge the District's responsibility under Section 504. Without a timely reevaluation the District did not have adequate data to determine the appropriate placement for Theodore [ ]. Expulsion is inappropriate before reevaluation.

Based on the weight of the evidence we find the District has not complied with Section 504 of the Rehabilitation Act and Reg. 84.35(a) of its implementing regulations.

Moreover, the District took this action in the absence of both the results of a timely reevaluation and an evaluation prior to discontinuing L.D. services, a significant change in placement. Therefore, the District did not have the required information to determine the relationship between the student's handicap and his behavior. Additionally, this behavior took place in the absence of recommended counselling services as noted below.

III.
Provision of Services

In his first evaluation, dated April 5, 1977, it was recommended that Theodore receive counselling services to assist him in avoiding the influence of "friends who were not achievers." The complainant states that Theodore has not received such services. There is no evidence in Theodore's file that he received counselling services.

Based on the preponderance of the evidence we find the District in violation of Section 504 for not providing appropriate related aids and services as required by the Section 504 Regulations, 45 C.F.R. Reg. 84.33(a).

IV.
District's Policy on Suspensions and Expulsions

In regard to the District's draft copy of Special Education Procedures and Policies, the section on Suspensions and Expulsions should be revised to comply with Section 504 of the Rehabilitation Act and Reg. 84.33(a) of its implementing regulations.

As stated above, suspension of a handicapped student is a change in placement for which a staffing is required. The District's rules merely afford the parent a due process hearing. Such a hearing is inappropriate prior to a staffing. A due process hearing is appropriate after a staffing if the parent is dissatisfied with the placement.

In summary, we find that the Community Unit School District No. 300 has denied Theodore [ ] a free appropriate education in violation of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, because of the following:

1. Failure to provide a timely reevaluation which is required every three years;
2. Failure to provide an appropriate Individualized Educational Program (IEP) to conform with EHA standards; Ted's last IEP did not include a statement of short-term instructional objectives.
3. Failure to conduct an evaluation before a change in placement, L.D. services were suspended (at Mrs. [ ]'s request).
4. Failure to let Theodore remain in his present placement pending a reassessment or reevaluation of his special educational needs; expulsion represented total denial of placement.

This Office is requesting that you provide us with a report within 30 days of the date of this letter regarding the following:

1. The provision of a reevaluation and placement in the least restrictive environment for Theodore [ ] in accordance with 45 C.F.R. Regs. 84.33, 84.35, 84.36.
2. The revision of the Suspension and Expulsion procedures as cited in Section IV of this letter.
3. Assurance that Theodore [ ] will be provided additional tutoring for the time he has lost (in school) by the expulsion.

You have 30 days to produce evidence refuting our finding, if you so desire. You also have the opportunity to discuss these findings personally with this Office if you notify us within 10 days of the date of this letter. You should also be aware that we are notifying Mrs. [ ] of our determination.

Reg. 84.61 of the regulation implementing Section 504, 45 C.F.R. Reg. 84.61, adopts and incorporates the Title IV procedural regulations contained at 45 C.F.R. Reg. 80.6-80.11 and 45 C.F.R. Reg. 81. In accordance with Reg. 80.7(d) of the Title VI Regulation, 45 C.F.R. Reg. 80.7(d), this Office wishes to obtain voluntary compliance, if possible.

This letter is not intended and should not be construed to cover any other complaints under Section 504 of the Rehabilitation Act of 1973 which may exist in your School District and which are not specifically discussed herein. Also, please be aware under the Freedom of Information Act, 5 U.S.C. 552, 45 C.F.R. Part 5, it is the policy of the Office for Civil Rights that copies of this letter and related materials may be released upon request.

If you have any questions, please do not hesitate to contact Mr. Lawrence P. Washington, Director, Elementary and Secondary Education Division at (312) 353-2540.

Kenneth A. Mines
Director
Office for Civil Rights
Region V

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Corinth Municipal Separate School District
June 6, 1980

Parent alleged that school district discriminated against student on basis of race and handicap in administration of disciplinary sanctions.

HELD, although allegation of racial discrimination could not be substantiated, school district violated § 504 in its evaluation, placement, and suspension of student. First, district identified student as having possible handicapping condition in November, 1978 but failed to initiate required preplacement evaluation until one year later, not a "reasonable time" under § 504. Second, student was temporarily placed in EMR program, as alternative to more severe disciplinary action, without preparation of preplacement evaluation or IEP. By moving student from regular class to EMR program without taking appropriate procedural safeguards, district could not determine whether EMR class would be least restrictive environment for pupil. Third, district assumed student was handicapped by placing him in EMR class. Therefore, by suspending student subsequent to that placement, and subsequent to his identification as qualified handicapped student in 1978, district violated § 504 and State procedural safeguards; under State law, district was prohibited from suspending any handicapped student for more than three days, and then only if behavior constituted a threat to others or an emergency, while under § 504 district was obligated to determine whether behavior leading to suspension was related to handicap and whether current placement and subsequent removal were appropriate. Moreover, district violated § 504 by failing to notify parent of right to challenge suspension through due process hearing. To remedy violations, district was advised to evaluate and reinstate student, provide for parent's participation in evaluation and placement, and provide compensatory assistance, including tutorial and summer programs, to overcome effects of discrimination.

Dr. O. Wayne Gann
Superintendent
Corinth Municipal Separate School District
212 Chambers
Corinth, Mississippi 38834

Re No. 04-80-1028

This is to notify you that we have completed our investigation of the above complaint against your school district. The complainant alleged discrimination on the basis of race and handicap in the suspension of her son from school.

We have determined that the district did not violate Title VI of the Civil Rights Act of 1964 in that race was not a factor in the suspension of [ ], the complainant's son. As you know, we are currently investigating another complaint alleging systemic discrimination on the basis of race in the administration of disciplinary sanctions against black students. Our letter of findings will be released upon completion of our investigation of that complaint.

We have determined that the district violated § 504 of the Rehabilitation Act of 1973 in the evaluation, placement, and subsequent removal of [ ], a handicapped student, from school.

We are enclosing a statement of findings that lists the specific violations, cites the regulations of § 504 that apply, and stipulates the requirements necessary to correct the violations.

As you know, our office is under court order to resolve investigations under strict time frames. The order provides for a period of 90 days to negotiate compliance following a determination of noncompliance. If we are unable to negotiate voluntary compliance, the order requires that administrative enforcement action be initiated by the Department within an additional 30 days. We must remind you that failure to correct the violations cited can lead to eventual loss of Federal financial assistance to the district.

In order to meet the terms of the court, we request that you submit, within 30 days of the date of this letter, the district's plan to correct the § 504 violations.

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence in response to inquiry.

The Office for Civil Rights remains willing at all times to assist the district to achieve compliance through voluntary means. If you have any questions, or if we can offer any assistance, please do not hesitate to call Mr. W. Lamar Clements, Director, Elementary and Secondary Education Division, at area code (404) 221-5930.

William E. Thomas, Director
Office for Civil Rights
(Region IV)

Statement of Findings for
Corinth Municipal Separate School District
Corinth, Mississippi

A desk investigation of the Corinth MSSD was conducted beginning on January 10, 1980, in response to a complaint of discrimination. The complainant, Ms. [ ], alleged that the district discriminated against

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[ ], on the basis of race and handicap in the administration of disciplinary sanctions.

Our office has concluded from the information provided by the complainant and the district that there is no violation of Title VI of the Civil Rights Act of 1964. Our decision is based on the fact that the allegation of differential treatment on the basis of race is not valid because, although [ ] was the only student suspended, the other student involved in the fighting incident is black. We have, therefore, determined that race was not a factor in his suspension.

We have determined that the district is in violation of § 504 of the Rehabilitation Act of 1973 and its implementing Regulation because of its failure to take appropriate actions in the case of [ ] prior to: (1) initial placement in the district's educable mentally retarded program; and, (2) placing him on indefinite suspension. Specifically, the district failed to take the following actions in violation of Regs. 104.33, 104.34 and 104.35 of the Regulation:

a. Conduct a pre-placement evaluation and a reevaluation as required by Reg. 104.35(a)(b)(1) and (2), and (d).
b. Make the placement decision as required by Reg. 104.35(c).
c. Develop an educational program designed to meet the individual needs of [ ]. Reg. 104.36(b).
d. Ensure that [ ], a qualified handicapped student, was provided an educational opportunity in the least restrictive environment. Reg. 104.34(a), (b).

A copy of the Regulation implementing § 504 is enclosed for your convenience.

The bases for our findings are as follows:

1. Initial placement

The district failed to take appropriate actions prior to [ ]'s initial placement in violation of Regs. 104.33, 104.34 and 104.35 of the Regulation as follows:

a. Conduct a pre-placement evaluation. Reg. 104.35(a)(b)(1) and (2).

[ ] was identified as having a possible handicapping condition on November 7, 1978.

Discipline records, interviews with school officials, and Mr. Seat, Counselor, Timberhills Mental Health Center, confirm that [ ] was identified as having a possible "behavioral" problem, and that he had been receiving counseling at the Timberhills Mental Health Center, at the request of the school district.

Special education records show that [ ] exhibited weakness in the following areas:

(1) "Social interaction with teachers or other children — aggressive behavior"
(2) "Emotional — daydreams and sleeps"
(3) "Academics — Reading, numbers and spelling"
(4) "General classroom behavior (aggravates and picks on peers)"

The Special Education Report also shows that in learning strategies [ ] exhibited the following performance:

(1) Pencil and paper activities	poor
(2) Listening and speaking activities "fails to participate in oral activities"	average
(3) Listening and motor activities "sleeps through class discussions"	poor
(4) Reaction to new activities	poor
(5) Reaction to failure	usually ignores
(6) Questions	does not have questions
(7) Strengths	recognizes basic sight words
(8) Weaknesses	very poor reading Helsons Reading Test vocab: 3.8 paragraph: 3.0 Stanford Binet Total 3.1
(9) Grades	1st 2nd 3rd C C F
(10) Weaknesses	Multiplication fractions advance problems

The above assessment was made one year after he had been identified as a handicapped student and consent was given to conduct a comprehensive evaluation. The Special Education report shows that he remained in the regular academic program although he was failing in three out of four major academic subjects. The results of this assessment and [ ]'s discipline record are evidence that the regular academic setting was inappropriate and that there did exist a critical and immediate need for a comprehensive evaluation to determine appropriate placement for [ ].

The dual consent form, signed by the parent on 11/9/78, shows that [ ] was identified as a possible handicapped student three months prior to receiving an indefinite three-month, end-of-the-year suspension. Special Education records show that the evaluation process was not initiated until 1/22/79. Special Education records also show that the school counselor recommended on 1/22/79 that an additional evaluation be considered to "rule out the existence of social maladjustment problems." There is no evidence to show that such an evaluation was conducted.

The district officials maintain that [ ] was never officially designated as a handicapped student on State records because the evaluation process was not completed.

The Regulation (Reg. 104.3(j)) defines a handicapped person as any person who (i) has a physical or mental impairment which substantially limits one or more life activities, (ii) has a record of such impairment, or (iii) is regarded as having such an impairment. Our office has de-

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termined that when [ ] was identified as a qualified handicapped student, the district was obligated to conduct an evaluation within a reasonable period of time. One year after the initial identification of [ ] as a qualified handicapped student the preplacement evaluation process was initiated, but to date has not been completed.

The district maintains that there was insufficient time to conduct a comprehensive evaluation of [ ] because of his frequent and intermittent suspensions. We found, however that the district had the following number of days available in which [ ] could have been evaluated:

consent given	11/9/78 - 11/28/78 —	13
	12/5/68 - 1/22/78 —	35
	1/22/79 - 2/21/79 —	22
first full school day	8/23/79 - 9/19/79 —	20
	9/19/79 - 10/15/79 —	16
		106

A total of 106 days throughout 1978-79 and 1979-80 school years (to the date of our on-site investigation) were available to the district to complete the evaluation process. Forty-eight days were available after consent for evaluation was given and prior to [ ]'s first suspension. The preplacement evaluation process was not initiated for 53 school days after the parent gave consent to evaluate.

The timetable shows that even with three suspensions, subsequent to receipt of parent consent to evaluate, there was sufficient opportunity for the district to administer an appropriate preplacement evaluation to determine eligibility and appropriate educational placement.

b. Make the placement decision. Reg. 104.35(c).

The evidence also establishes that the district temporarily placed [ ] in Special Education (EMR) without an appropriate preplacement evaluation in violation of Reg. 104.35(a) and (b) of the Regulation.

Interviews conducted with the complainant, *et al.*, and confirmed by district officials, show that [ ]'s placement in the EMR program was the result of recurring discipline problems. He was placed in EMR as an alternative to a more severe disciplinary action, pending the initial evaluation and eligibility determination by the Regional Screening Team. At that time, [ ] had been placed in the EMR program for approximately three months. (The dual consent for evaluation and placement form does not show the exact date of placement.)

c. Develop an educational program designed to meet the individual needs of [ ]. Reg. 104.33(b).

The district circumvented the preplacement process when [ ] was placed in special education as an alternative disciplinary sanction without an initial evaluation, staffing, and the development of an individualized educational program designed to meet his individual needs.

The provision of an appropriate education, and related aids and services (*i.e.*, counseling) tailored to meet the individual needs of this qualified handicapped student, could not have been provided until the required evaluation process was completed, including all testing, staffing, and development of an individualized educational program. Therefore, no individualized education program has been developed.

The act of circumventing the evaluation and staffing process does not negate the district's obligation for providing a free appropriate education for this student. Section 504 and its implementing Regulation prohibits the temporary special education placement and provision of related services prior to a comprehensive evaluation to determine the appropriate placement and relevant services.

A timely evaluation was not afforded to [ ] prior to his initial placement in the special education (EMR) program.

d. Ensure that [ ] was provided an educational opportunity in the least restrictive environment. Reg. 104.34(a)(b).

The district moved [ ] from the regular class setting to a self-contained EMR class setting without taking appropriate preplacement safeguards to determine that a self-contained EMR class was the least restrictive environment to meet his educational needs.

We found that the district failed to ensure that [ ], a handicapped (EMR) student, was provided an educational opportunity in the least restrictive environment.

The district maintains that [ ]'s behavior was disruptive and constituted a clear danger to the other students, which warranted immediate suspension. The regulation does provide for removal of a handicapped student under the above conditions. However, the regulation also states that "a recipient may not exclude any qualified handicapped person from a public elementary or secondary education unless it is demonstrated that the education of the person in the regular environment with the use of supplementary aids and services cannot be achieved satisfactorily." Regs. 104.33(d) and 104.34(a).

If the district determined, through the appropriate review process, that the removal of [ ] from the educational environment was necessary, an alternative education setting should have been provided.

During the suspensions, the district, in fact, excluded [ ] from the education environment and did not ensure the provision of an alternative educational program (*i.e.*, homebound) for this qualified handicapped student. The suspensions excluded him from the education process and restricted his opportunity for an alternative educational placement.

The failure to make such provisions violated [ ]'s right to education in the least restrictive environment in violation of Reg. 104.35.

2. Indefinite Suspension

We have found that the district failed to appropriately review [ ]'s placement prior to his removal from school, several times, (suspension) in violation of Regs. 114.34, 104.35 and 104.36. The bases for our findings are as follows:

[ ] was suspended seven times subsequent to his identification as a qualified handicapped student — from November 1978 - October 1979 — for a total of 126 days as of the date of our on-site visit. ([ ] is currently serving a suspension that began October 19, 1979.)

The following is a chronology taken from the disciplinary and special education records provided by the district.

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The actions listed occurred prior to and including the October 19, 1979 indefinite suspension (termed "expulsion" by the district) of [ ]:

Date	Action	Offense
5/4/77	*suspended	fighting
9/21/78	suspended (1 day)	fighting
10/23/78	3 licks	fighting
11/7/78	dual consent/evaluation placement sent to parent	
11/9/78	dual consent evaluation/ placement signed by parent	
11/28/78	suspended (3 days)	fighting
12/5/78	3 licks	fighting
12/7/78	in school suspension	fighting
1/11/79	in school suspension (3 days)	fighting
1/22/79	suspended (1 day)	fighting
1/22/79	"parent verbally agreed to put [ ] in Special Education (Mr. Johnson's class)"	
1/22-30/79	[ ] placed in EMR class	
1/22/79	test administered (Boyd)	
2/8/78	referred for screening (classroom teacher)	
2/8/79	test administered Adaptive ST	
2/15/79	three licks	fighting
2/21/79	suspended (pending board hearing) (three months end of year)	fighting
8/30/79	readmitted on probation on condition that [ ] would see a counselor at the Timberhills Mental Health Center to improve adaptive behavior patterns with peers	
9/12/79	suspended (1 day)	cutting class
10/15/79	suspended (1 day)	fighting
10/19/79	suspended (3 months to date)	fighting
10/25/79	hearing delayed	
11/1/79	Board hearing re 10/19/79 suspension	indefinitely suspended

* Records do not indicate the number of days suspended.

The chronology reveals that [ ] was placed in the EMR program (Mr. Johnson's class) prior to the end of the 1978-79 school year without an initial evaluation and approval by the Regional Screening Team (RST). He remained in the program until his 10/19/79 suspension (Ms. Bigger's class).

The act of initially placing this student in the EMR program constituted an assumption of a handicapping condition and, therefore, subject to the procedural safeguards set forth in the § 504 Regulation Reg. 104.36.

We, therefore, conclude that the district failed to provide an appropriate education for [ ], a qualified handicapped student, in violation of Reg. 104.33(a), (b)(1) and (b)(2).

District officials stated that the school district has adopted and implemented evaluation, placement, and due process policies and procedures in accordance with the Mississippi State policies and operating procedures for exceptional children. *Mattie T. v. Holladay*, 3 EHLR 551:109 [1979-80 DEC.].

We noted that Mississippi State Department memorandum DI-SE Bulletin No. 79, effective April 15, 1979, prohibits the removal of a handicapped student, except under certain conditions. Only condition "e" is relevant to this issue. This condition states that:

> "a handicapped student can be removed only if the child's behavior represents an immediate physical danger to him/herself or others or constitutes a clear emergency within the school such that removal from school is essential. Such removal shall be for no more than three (3) days and shall trigger a formal comprehensive review of the child's IEP. If there is disagreement as to the appropriate placement of the child, the child's parents shall be notified in writing of their right to a SPED impartial due process hearing. Serial 3-day removals from SPED are prohibited."

The district indefinitely suspended [ ] on two separate occasions prior to the completion of the initial preplacement process and the determination of appropriate placement, and appropriate services.

It is evident, therefore, that the district failed to comply with State policy when [ ] was removed indefinitely from the education program without a formal comprehensive review of his individualized education program.

[ ] was initially identified as a qualified handicapped student on November 7, 1978. The district did not, however, ensure that all significant changes in placement were reviewed by a group of persons, knowledgeable of his handicap, to determine whether or not: (1) his behavioral problems were manifestations of his handicap; and (2) his current placement and subsequent removal (suspension) were appropriate.

The district failed to notify the parent of her child's rights to an impartial hearing, as a result of the disagreement regarding his suspension.

The failure to implement the appropriate procedural safeguards prior to the initial placement and prior to indefinitely suspending the student violates Reg. 104.36 of the Rehabilitation Act of 1973.

* * *

The Office for Civil Rights, within its authority as an enforcement agency for § 504 of the Rehabilitation Act of 1973 requires that the Corinth Municipal Separate School District begin immediately to correct the violations outlined above by taking the following corrective actions:

1. Upon receipt of this letter, reinstate [ ] and evaluate him as prescribed by § 504;
2. Contact the parent, [ ], for participation in the evaluation and placement process of her son;
3. Provide compensatory assistance, including tutorial and summer programs for [ ] for as long as is necessary to meet graduation or comparable certification requirements to overcome the effects of the discrimination; and,
4. Assure that no age requirement will preclude the district from meeting the actions required above.

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Fayette (MO) R-III School District
October 18, 1978

Complainant alleged that eighth-grade child was denied a free and appropriate public education when LEA failed to acknowledge child's handicap and provide educational program suitable to his needs, and then expelled him from school for disruptive behavior. Complainant further maintained that expulsion hearing denied child appropriate due process under § 504.

HELD, LEA violated § 504 and Reg. 84.33 by failing to make any attempt to identify child's special education needs or recommend appropriate placement, in spite of clear and available evidence that child was handicapped as defined under Reg. 84.3(j) and that child's academic and behavioral problems were related to this handicap. LEA further violated § 504 and Reg. 84.36, as interpreted in OCR Policy Interpretation No. 6, when it expelled child from school without providing either an impartial hearing or due process review procedures. Compliance with EHA, 20 U.S.C. § 1415 is one means by which LEA can meet § 504 due process requirements.

Frank McKenzie, Superintendent
Fayette R-III School District
Lucky Street, Route No. 3
Fayette, Missouri 65248

The Office for Civil Rights has completed its investigation of your District's alleged failure to provide a free appropriate public education to a qualified handicapped student. You were advised of this allegation in our letter of August 4, 1977.

Based on the analysis of the data and information obtained during this investigation, there is sufficient evidence to conclude that the District discriminated on the basis of handicap by not providing a free appropriate public education to a qualified handicapped student, [ ]. There is also sufficient evidence to conclude that [ ] was denied appropriate due process at his expulsion hearing before the School Board. Therefore, it has been determined that the Fayette R-III School District is not in compliance with the educational provisions (Section 84.33), nor with the procedural safeguards (Section 84.36) of Section 504 of the Rehabilitation Act of 1973 and HEW Policy Interpretation Number 6. [For text, see *EHLR*, p 251:03.]

Our investigation revealed the following basic facts regarding [ ]:

A. During the 1975-76 school year, [ ] was an 8th grade student at the Fayette Intermediate School.

B. According to a memorandum in [ ]'s file, he was in the remedial reading program in the Fayette Intermediate School for the year 1973-74. He was not in the program for the 1975-76 year. It was recommended by the remedial reading teacher that [ ] not be given priority placement for the 1975-76 caseload.

C. During the period from September 9, 1975, to October 17, 1975, [ ] was suspended from class five times for a total of 10½ days. Two additional times, from October 17, 1975, to November 13, 1975, and from November 13, 1975, until further Board action, he was suspended for a total of almost two months.

D. On December 10, 1975, and January 14, 1976, a hearing was held before the School Board resulting in the Board's voting to expel [ ] from school.

As stated above, the analysis of the data and information obtained during this investigation indicated that there is sufficient evidence to conclude that the District discriminated on the basis of handicap. The District is not providing a free appropriate public education for [ ], nor is there evidence to indicate the District has tried to place him in any appropriate setting outside the District.

It was established that [ ] comes under the jurisdiction of Section 504 of the Rehabilitation Act of 1973 in that he has been defined as a "handicapped person" by the Fulton State Hospital and the University of Missouri in that he has, pursuant to Section 504, Subpart A (84.3(j)), a "physical or mental impairment which substantially limits one or more major life activities." This handicap is a result of a specific learning disability (Section 84.3(j)(i)(8)), that prevents him from performing satisfactorily in a regular classroom setting.

Although [ ] was at one time placed in the remedial reading program, it appears that the District's attempts to appropriately place him were minimal at best. The recommendation by the remedial reading teacher that [ ] not be given priority placement in the 1975-76 caseload was based on his performance, attitude and lack of achievement. However, there was no evidence to indicate that [ ] was properly evaluated before his placement in the remedial reading program, nor was there evidence to indicate that the District's efforts at remediation were appropriate. This latter point is evidenced by the summary of testing at the University of Missouri's Developmental Evaluation Center in March, 1976, which states that [ ] "has a learning disability . . . that has never been remediated."

During the period from September 9, 1975, to October 17, 1975, [ ] was suspended from class at least five times for a total of 10½ days. Two additional times, from October 17, 1975, to November 13, 1975, and from

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November 13, 1975, until further Board action, he was suspended for a total of almost two months. [ ]'s infractions included fighting, disturbing class, disrespect and name calling.

On December 10, 1975, and January 14, 1976, a hearing was held before the School Board resulting in the Board's voting to expel [ ] from school. The procedures under which this hearing was held are in violation of Section 504 in that the hearing was not impartial, and that there appears to be no review procedures.

In addition, the Board ruled that "except for some reading deficiency, the 'Student' is not handicapped within the purview of MRS, Chapter 162." Contrary to this ruling, there is sufficient evidence to conclude that [ ] is indeed handicapped, pursuant to Section 504, and that there appears to be a direct correlation between [ ]'s learning disability and his behavior disorder. The "reading deficiency" referred to by the Board was diagnosed as a "Learning disability in the area of reading" by the Staff Physician at the Warren E. Hearnes Children and Youth Center, Fulton State Hospital. The Staff Physician, Dr. Craft, went on to say that [ ] may well be in circumstances at his school that lead to a good deal of frustration and misunderstanding. Over a period of time these factors seem to have led to some degree of negativism as evidenced in [ ]'s attitude." Margaret Armento, Counselor at Fulton State, reported in her evaluation of [ ] that he "seemed to have a need to maintain a 'tough guy' veneer though it was my impression that his basic personality characteristics are not of this nature." Ms. Armento went on to say that "if anything, [ ] seems to be more a boy who is discouraged by his problems and lack of success and who enjoys another person's taking a genuine interest in him." It is important to note that although these evaluations were mailed to the District before the January 14, 1976 hearing, postmarked December 12, 1975, they were not considered by the Board. There was also no evidence that the Board considered the evaluation by the school psychologist contained in a memo dated September 16, 1975, which recommended individualized instruction; nor was there any mention of a Student Progress Report completed by Coach Grimes on October 8, 1975 which stated, "[ ] has expressed to me that his poor attitude and behavior stems from the fact that he cannot read on a level with his peers. He does not seem to care about what happens when he misbehaves."

Subsequent to [ ]'s expulsion, he was extensively evaluated at the University of Missouri Medical Center's Developmental Evaluation Center. This evaluation resulted in the following impressions:

1. "Undetermined intelligence but functioning at least at an upper borderline level, with previous testing suggesting probable average potential."
2. "Learning disability, as evidenced by poor sequential memory, reading disability, poor auditory perception, and visual perception problems.
3. "Behavior problem characterized by acting out and poor motivation for academic instruction."

The evaluation summary by the University of Missouri went on to advise that [ ]'s reading disability is severe enough to necessitate placement in a self-contained classroom for children with learning disabilities for all academic instruction. The evaluation also stated that he will require a supportive environment with considerable structure in order to help him establish better behavioral controls; his curriculum should be oriented toward practical skills and, when he is old enough, a work program would be beneficial; he will also require remediation for his auditory sequential memory and auditory analytical skills in conjunction with LD instruction. Supportive counseling in the school situation was also recommended.

A Psychological Summary by Dr. Robert C. McMahon, Ph.D., at the University of Missouri, with regard to [ ]'s intellectual evaluation stated that [ ] appears to be a youngster functioning either in the low normal or high borderline range of intelligence who appears to have significant difficulties in areas of visual and auditory sequential short-term memory and in ability to absorb new material in a visual associative context. Visual motor integration skills appear slightly decreased. [ ]'s difficulties in these areas are consistent with the diagnosis of specific learning disability."

With regard to [ ]'s social and behavioral evaluation, Dr. McMahon stated that [ ] appears to be a youngster who entertains a quite unfavorable self-concept. He seems to feel inadequately equipped to meet demands at school and does seem to be a rather angry young man who is easily frustrated. He talked at some length about his difficulties in school and does appear to feel rather hopeless about the prospects for success in this area. He does appear to feel that he has been unfairly treated in school and that too much has been asked of him. A tendency to project blame for his own failures is quite evident in [ ]'s thinking. This strategy is often used by children who have specific difficulties in learning." Dr. McMahon went on to recommend that [ ] needs a special educational placement and might be best suited for either an LD classroom or behavior disorder classroom."

The results of the two previously mentioned evaluation (Fulton State Hospital and the University of Missouri) clearly indicate a strong correlation between [ ]'s learning disability and his behavior disorder. It appears that the District was well aware of [ ]'s behavior disorder in that a referral form to the State Department of Education was completed on December 6, 1976; however, a check of District files and an interview with the Superintendent indicated that the District did not follow through with the referral.

Also found in [ ]'s file was a letter dated May 5, 1976, from the Missouri Commissioner of Education, Mr. Arthur Mallory, advising Mr. Gary Oxenhandler, [ ]'s attorney, that the Assistant Commissioner for Special Education, Dr. Leonard Hall, had discussed [ ]'s situation with the then Fayette Superintendent, Mr. William Clark. Mr. Mallory explained that Mr. Clark told Mr. Hall that in light of the evaluation at the University of Missouri, Mr.

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Clark felt "certain the Board would want to reconsider its earlier position." Mr. Mallory went on to say that hopefully the District would "initiate the necessary steps to provide for [ ] an appropriate special education service in compliance with the law." There was no evidence found in District files that indicated any such action, nor was there evidence of any more recent attempt by the District to readmit or appropriately place [ ]. Thus, it is apparent that [ ] is being denied a free and appropriate public education.

Therefore, this Office is requesting that your District submit a plan within 30 days that specifically outlines your intent to afford [ ] due process as required by Section 504 of the Rehabilitation Act of 1973. Compliance with the procedural safeguards of [§ 1415] of the Education of the Handicapped Act is one means of meeting this requirement. Furthermore, we are requesting that your District, within 30 days, forward to this Office a plan for providing [ ] a free and appropriate public education on or before September 1, 1978.

Under requirements of the Freedom of Information Act, it may be necessary to release this document and related correspondence in response to appropriate inquiries.

I am sure your District shares our deep concern for a quality education for all children. If we can be of any assistance, please do not hesitate to contact Jesse L. High, Acting Division Director, Elementary and Secondary Education, of my staff.

Taylor D. August, Director
Office for Civil Rights
Region VII

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Lower Snoqualmie Valley School District No. 407
September 24, 1980

Official with Washington Association for Children with Learning Disabilities brought complaint which alleged school district violated § 504 by: (1) requiring students to participate in Saturday Alternative-to-Suspension Program when such program was not included in IEPs, (2) making access to student records contingent on paying fee, (3) taking retaliatory action against handicapped students by suspending them in direct relation to parents seeking their rights, (4) suspending/expelling students without taking into consideration handicapping condition, (5) failing to notify parents of district's duty to provide FAPE and ignoring requests for due process hearings and (6) failing to follow required evaluation and placement procedures.

HELD, investigation of first three allegations showed no violation of § 504 because (1) evidence demonstrated parents' awareness that Saturday Alternative-to-Suspension Program was optional, not required; (2) fees charged parents were for copies of records, not for right to inspect files; and (3) OCR could not corroborate that district was suspending students in direct relation to parents seeking their rights. However, because it was impossible for OCR to determine whether violation occurred since district destroyed discipline records at end of year, district was advised to retain files for at least three years in order to meet § 504 requirements. OCR did find that district violated § 504 by: (4) not differentiating between handicapped and nonhandicapped students in terms of suspension and corporal punishment; OCR informed district it had to include in its discipline procedures a process for determining whether student's inappropriate behavior leading to suspension or punishment was caused by a handicap; (5) failing to notify parents on at least an annual basis of its duty to provide a FAPE, requiring mediation before scheduling due process hearings, and (6) failing to properly implement IEPs and failing to provide parental notification of procedual safeguards concerning evaluation and placement.

Mr. Gene F. Maxim
Superintendent
Lower Snoqualmie Valley School
School District No. 407
Route One, Box 474
Carnation, Washington 98014

RE: Complaint No. 10791031

This will notify you that the Office for Civil Rights has completed its investigation of the discrimination complaint filed against Lower Snoqualmie Valley School District No. 407, by Gerri Seppi, Executive Secretary of the Washington Association for Children with Learning Disabilities (WACLD). Ms. Seppi alleged violation of Section 504 of the Rehabilitation Act of 1973.

We have concluded that the district violates Section 504 of the Rehabilitation Act of 1973 because it has not provided an appropriate education to handicapped children with respect to certain issues investigated. A detailed Statement of Findings is enclosed, which includes the evidence upon which our findings are based, our conclusions and required corrective action.

We found the district in compliance with the Section 504 Regulation with respect to other issues investigated. These also are set forth in the Statement of Findings.

This complaint initially was investigated in May, 1979. Pursuant to a Headquarters directive, it was referred to our Central Office for policy clarification. Investigation was resumed in May, 1980.

We are grateful for the cooperation that your staff extended to our investigators during our on-site investigation. I want you to be assured that we will be available to answer any questions you may have concerning the attached Statement of Findings.

Please be advised that obligations of the Office for Civil Rights under the Freedom of Information Act require that we release this letter and other information about this case upon request by the public.

Gary D. Jackson
Acting Regional Director
Office for Civil Rights
Region X

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STATEMENT OF FINDINGS
September 24, 1980

Ms. Seppi, Executive Secretary of the Washington Association for Children with Learning Disabilities filed this complaint on behalf of special education students in the district. She contends that the district discriminated against special education students during the 1978-1979 school year by the following acts:

1. The district used its Statement of Responsibilities and Rights for students to suspend/expel special education students, without taking their handicapping condition into consideration.
2. The district failed to notify parents of special education students of their rights, and ignored their request for a due process hearing.
3. The district required special education students to participate in an alternative program that is not a part of their individualized education programs.
4. The district refused parents the right to inspect their children's files without paying for the service.
5. The district took action against special education students by suspending them in direct relationship to their parents' seeking their rights.
6. The district failed to adhere to proper evaluation and placement procedures for special education students and is not providing an appropriate education to them on individual needs.

We have concluded that the district violates Section 504 of the Rehabilitation Act of 1973 because it has not provided an appropriate education to handicapped children. In this statement, we shall explain our findings, identifying specific violations.

The implementing Section 504 Regulation provides:

> 34 CRF Reg. 104.4 Discrimination prohibited.
>
> (a) *General*. No qualified handicapped person shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity which receives or benefits from Federal financial assistance.
>
> Reg. 104.32 Location and notification.
>
> A recipient that operates a public elementary or secondary education program shall annually:
>
> ...(b) Take appropriate steps to notify handicapped persons and their parents or guardians of the recipient's duty under this subpart.
>
> Reg. 104.33 Free appropriate public education.
>
> (a) *General*. A recipient that operates a public elementary or secondary education program shall provide a free appropriate public education to each qualified handicapped person who is in the recipient's jurisdiction, regardless of the nature or severity of the person's handicap.
>
> (b) *Appropriate education*. (1) For the purpose of this subpart, the provision of an appropriate education is the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met, and (ii) are based upon adherence to procedures that satisfy the requirements of Regs. 104.34, 104.35, and 104.36.
>
> Reg. 104.35 Evaluation and placement.
>
> (a) *Preplacement evaluation*. A recipient that operates a public elementary or secondary education program shall conduct an evaluation in accordance with the requirements of paragraph (b) of this section of any person who, because of handicap, needs or is believed to need special education or related services before taking any action with respect to the initial placement of the person in a regular or special education program and any subsequent significant change in placement.
>
> (b) *Evaluation procedures*. A recipient to which this subpart applies shall establish standards and procedures for the evaluation and placement of persons who, because of handicap, need or are believed to need special education or related services which ensure that:
>
> (1) Tests and other evaluation materials have been validated for the specific purpose for which they are used and are administered by trained personnel in conformance with instructions provided by their producer;
>
> (2) Tests and other evaluation materials include those tailored to assess specific areas of educational need and not merely those which are designed to provide a single general intelligence quotient; . . .
>
> (c) *Placement procedures*. In interpreting evaluation data and in making placement decisions, a recipient shall (1) draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior, (2) establish procedures to ensure that information obtained from all such sources is documented and carefully considered, . . .
>
> Reg. 104.36 Procedural safeguards.
>
> A recipient that operates a public elementary or secondary education program shall establish and implement, with respect to actions regarding the identification, evaluation, or educational placement of persons who, because of handicap, need or are believed to need special instruction or related services, a system of procedural safeguards that includes notice, an opportunity for the parents or guardian of the person to examine relevant records, an impartial hearing with opportunity for participation by the person's parents or

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guardian and representation by counsel, and a review procedure. Compliance with the procedural safeguards of Section 615 of the Education of the Handicapped Act is one means of meeting this requirement.

The investigating team interviewed district personnel, parents of special education students and concerned citizens during the on-site portion of the investigation. The team also took a sampling of 16 folders, or 20% of the total number of 80 special education folders on file in the district's special education office. Of these folders, 11 were for Learning Disabled (LD) students, 3 for Behaviorally Disabled (BD) students, 1 for a Mildly Mentally Retarded (MMR) student, and 1 for a Neurologically Impaired (NI) student. Additional special education files for the 16 students reviewed that are kept in the counseling office and in the special education classrooms also were reviewed.

The Office for Civil Rights has concluded that Allegations 3 and 4 cannot be substantiated, and no violations of Section 504 were proven. Our discussion of the allegations is set forth below.

Allegations–No Violations Found

Allegation No. 3

The district requires special education students to participate in an alternative program that is not a part of their individualized education program.

Evidence

According to district documents and district personnel who described the program, the Saturday Alternative-to-Suspension Program was one of the options offered to all students whose behavior resulted in their suspension. Students could either (1) take the suspension, (2) attend one Saturday morning session for each day of suspension, or (3) do work under the custodian's supervision an hour per day with four hours work equalling one day of suspension. Since parents of special education students interviewed acknowledged their awareness that the Saturday Program was optional, this allegation could not be corroborated.

Finding

Special education students are not required to participate in the Saturday Alternative-to-Suspension Program, and there is therefore no violation of 34 CFR Reg. 104.35(b) concerning this allegation.

Allegation No. 4

The district refuses parents the right to inspect their children's files without paying for the service.

Evidence

Parents of special education students complained that they had to pay a fee before they could inspect their children's files.

Ms. Roetcisoender, vice-principal at Tolt High School, stated that student files may be inspected by their parents without a charge. She explained that it is a district policy that a fee be charged for the labor and materials involved in providing copies of student file documents requested by any district parent.

Upon inquiry, the parents involved acknowledged that they had requested and received *copies* of files, rather than access to files.

Finding

The district does not charge parents of handicapped or special education students fees to inspect their children's records. There is therefore no violation of 34 CFR Reg. 104.36 concerning this allegation.

Special Case

Allegation No. 5

The district takes action against special education students by suspending them in direct relationship to their parents' seeking their rights.

Evidence

Parents claimed that district suspensions of their children were accelerated when the parents questioned district policies.

In attempting to investigate Allegation No. 5, we found that a vital source of information, the district discipline files, had been destroyed as part of district policy to give each student a clean slate for the following school year. It was thus not possible to compare records of disciplinary actions against the students before and after parents' due process requests, and to note the date of these actions to determine if the disciplinary actions were received after the parents expressed their concerns, as was alleged.

34 CFR 100.6(b), the procedural provisions applicable to Title VI of the Civil Rights Act of 1964 which also apply to 34 CFR 104, requires recipients to keep such records and submit to Department officials such reports as the responsible Department official may deem necessary to enable him to ascertain whether the recipient is complying or had complied with the Regulation. In this instance no such records were available to supply specific information in connection with its disciplinary practices and procedures to determine its compliance status in the area of discipline.

Such record keeping would enable the district to self-monitor its disciplinary activities. Discipline files could be maintained in confidentiality to protect students during the school year and retired to an inactive file at the end of each school year unavailable to district staff.

Finding

There was insufficient evidence to conclude that the district discriminates on the basis of handicap in the administration of discipline to its special education students by increasing the suspensions of special education students whose parents sought their rights. We therefore found no violation of 34 CFR Reg. 104.36 concerning this allegation.

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Allegations–Violations Found

We found the district violated the civil rights statute protecting handicapped students in the areas covered by the remaining allegations as follows:

Allegation No. 1

The district uses its Statement of Responsibilities and Rights for Students to suspend/expel special education students, without taking their handicapping condition into consideration.

This allegation included both suspension and expulsion. The subject of corporal punishment was brought to our attention on-site as an additional problem. In this section we will address the findings in suspension, expulsion and corporal punishment in that order.

Evidence

A. *Suspension*

Parents interviewed during the on-site investigation stated that the special education students were treated the same as were nonhandicapped students in the manner in which the district disciplined its students. The parents and other concerned citizens interviewed felt that students with behavioral problems related to their handicapping condition were, in effect, being disciplined for being handicapped. These disciplinary actions frequently included short-term suspensions.

The district's Statement of Responsibilities and Rights for Students does not differentiate between handicapped and nonhandicapped students in its provisions for disciplinary treatment. During the interviews with district personnel, it became clear that they saw no necessity for recognizing a difference between behavioral problems of handicapped and nonhandicapped students. District personnel treat all students equally in meting out discipline for infractions of school rules. Testimony from the Director of Special Education, and from teachers of both special education and regular classes revealed that special education students who exhibit inappropriate behavior when attending regular classes are disciplined in the same manner as are nonhandicapped students. Regular classroom teachers did not know which of their students were special education students, during the 1978-1979 school year. A special education student in a regular classroom was therefore subject to the same discipline procedures applied to nonhandicapped students, without consideration being given to his/her handicapping condition.

Finding No. 1 A–Suspension

Although there were no discipline files available for review, statements by district personnel confirmed the parent's allegations that the district has denied special education students an appropriate education by treating their behavioral problems in the same manner in which they treat the discipline problems of nonhandicapped students. The district therefore is in violation of 34 CFR Regs. 104.33(a), (b)(1).

Where the relationship between the student's behavior and handicap is an issue, the school district has the burden of establishing through an impartial due process hearing that the student's handicap and behavior are unrelated. Where the behavior the school district proposes to discipline is found to be unrelated to either the student's handicap or the appropriateness of the educational placement, the student is subject to the same disciplinary sanctions as nonhandicapped students.

Here again, a policy of maintaining discipline files is necessary. It would provide the district with the ability to anticipate the imposition of suspensions which might constitute a change in educational placement. Suspensions amounting to a significant change in educational placement of handicapped students require the prior evaluation procedures set out in 34 CFR Reg. 104.35(a).

B. *Expulsion*

Evidence

Although the allegation included expulsion there was no evidence or testimony obtained to corroborate the occurrence of this type of disciplinary sanction. Again, no discipline files were available to review.

Finding No. 1 B–Expulsion

There was no evidence to support the allegation that the district expelled special education students without considering handicapping conditions. We therefore find no violation of 34 CFR Regs. 104.33(a), (b)(1).

C. *Corporal Punishment*

Although corporal punishment was not included in Allegation No. 1, testimony obtained on-site required that this aspect of discipline be examined.

Evidence

Parents of Behaviorally Disabled and Learning Disabled students claimed that during the 1978-1979 school year their children were "swatted" prior to their being informed of the disciplinary action. Statements from district personnel who administered discipline varied as follows: (1) special education students were never swatted without prior parental consent; (2) parents are notified, when possible, prior to the disciplinary action, and if not available by phone at the time of the swatting, they are notified later by phone and mail. All district personnel agree that such disciplinary action is witnessed and documented, and the documents are filed until the end of the school year, at which time they are destroyed.

Testimony of district personnel administering discipline clearly indicated that handicapped and nonhandicapped students were not treated differently with respect to disciplinary actions, and thus the handicapping conditions of special education students were not considered for any type of discipline, in violation of 34 CFR Regs. 104.33(a), (b)(1).

During the 1978-1979 school year—the time period under investigation—the district had no written policy for administering, witnessing or documenting corporal punishment. The district's August 15, 1977 Board Policy defines

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discipline, under No. 5300, Students' Rights and Responsibilities, III, Terms Defined:

> "A. Discipline—All forms of corrective action or punishment other than suspension and expulsion but including exclusion from a single class or activity for the balance of the period."

Sections IV, Discipline, Suspension and Expulsion Criteria, and V, Discipline, Suspension and Expulsion Procedures describe criteria and procedures for suspension and expulsion only. Corporal punishment, which would be considered as discipline under the district's definition, is not addressed at all in passages describing criteria and procedures. It was not until November, 1979, that No. 5380, Discipline was added to the Board Policy document, addressing detention after school and corporal punishment.

It appears doubtful, therefore, that discipline files would have contained documented "swatting" records had they been available for review, absent any requirements for such documentation.

Finding 1 C–Corporal Punishment

The district failed to consider the handicapping condition of special education students in administering corporal punishment, in violation of 34 CFR Regs. 104.33.(a), (b)(1).

Allegation No. 2

The district has failed to notify parents of special education students of their rights, and has ignored their requests for due process hearings.

A. *Notification of Rights*

Evidence

Parents interviewed testified that they were not informed of their rights and those of their children in special education. One parent was not aware that the district was obligated to provide special education programs, or that her child was entitled by law to participate in these classes. This parent was not informed of the evaluation procedures, nor of what should be included in an IEP when she participated in the IEP meeting.

During a telephone conversation, district Superintendent Maxim explained that notice was not sent notifying the community of the district's obligation to serve all special education students in its jurisdiction during the 1978-1979 school year. He explained that the district had no special education director at that time, and employed only two special education teachers.

Finding No. 2 A

The district is in violation of 34 CFR Reg. 104.32(b) because of its failure to notify handicapped persons and their parents on an annual basis, of its duty to provide a free and appropriate education to each qualified handicapped person in its jurisdiction.

B. *Improper Response to Due Process Hearing Requests*

This allegation was investigated in an individual complaint filed against the district in April, 1979, and also was included in the class complaint filed by Ms. Seppi.

Evidence

An interview with Superintendent Maxim revealed that district policy was to mediate with parents prior to scheduling a due process hearing. This insistence upon mediation is not supported by the requirements of the Regulations, which require, at 34 CFR Reg. 104.36, notice, an opportunity for parents to examine relevant records, an impartial hearing, and a review procedure.

Finding

The district is in violation of 34 CFR Reg. 104.36, by requiring mediation prior to scheduling hearings. The district's policy of requiring mediation prior to a hearing has been used to delay the provision of prompt hearings for its students. Such a policy places additionally upon special education students the burden of a delay in the provision of appropriate education.

Allegation No. 6

Failure to adhere to proper evaluation and placement procedures for special education students, and not providing an appropriate education based on individual needs.

A. *Evaluation*

Statements provided by parents concerning this allegation actually applied to the pre-placement procedure. Therefore, these matters are addressed under Part B, Placement, under evidence.

Part B Placement

(1) Inclusion of professional recommendations from outside the district.

Evidence

Parents interviewed during the on-site visit expressed concern that recommendations provided by social and/or health agencies and private psychologists that were treating or had treated special education students were not being used in preparing students' IEPs.

Special education faculty members stated that they did consider outside recommendations. The district psychologist stated that such recommendations would have been taken into account "if available." In addition, the OCR investigations found several reports and/or references to reports in student folders, from the Children's Orthopedic Hospital, the University of Washington, the Eastside Community Mental Health Center, and from private psychologists that had treated students.

There was no evidence that the recommendations from sources outside the district were routinely included in psychological reports, or that they were routinely ignored. There was evidence that the school psychologists had in-

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cluded comments from such sources in some of their own recommendations.

Finding

Parents' allegations on this subject were not supported by evidence. There is no evidence that the district failed to adhere to its placement procedures in recognizing and utilizing professional recommendations from outside the district. We therefore find no violation of 34 CFR Regs. 104.35 (c)(1), (2).

(2) Completeness of IEPs and their implementation.

Evidence

Several parents complained that their children were not receiving an appropriate education because the IEPs were incomplete or had not been reviewed on the projected review date. Parents of three students stated that their children had no current IEPs.

Evidence

During our entrance conference with Superintendent Maxim on September 25, 1979, he stated that the district follows P.L. 94-142 in formulating the individual learning programs required by Section 504 of the Rehabilitation Act of 1973. This statute requires the preparation and implementation of an individual education program (IEP) for each student who qualified as eligible for a special education program, after prescribed evaluation procedures have been followed. The implementing Regulation of Section 504 provides, at 34 CFR Reg. 104.33(b)(2) that an IEP is *one* method of meeting the standard established as "designed to meet individual needs of handicapped persons as adequately as the needs of nonhandicapped persons are met." The standard also requires that the program is based upon procedures that satisfy the Section 504 requirements for an educational setting, evaluation and placement and for procedural safeguards.

Of the 16 students' folders perused:

7 (44%) contained no IEPs for 1978-1979; and
5 (31%) contained IEPs lacking parental signatures or documented contact attempts.

Of the 9 folders containing IEPs:

7 (78%) lacked instructional objectives;
6 (67%) lacked initiation or duration dates; and
6 (67%) indicated unobserved review dates.

Finding

The district has identified the IEP required by P.L. 94-142 as the only method being used for defining the special education students' educational needs and outlining their individual learning programs. Failure to implement these programs; *i.e.*, not completing short-term instructional objectives, not meeting review dates and not specifying initiation and duration dates for programs to guide the classroom instruction, constitutes failure to implement the only program the district recognizes for delineating special education students' programs. By this failure to implement the individual programs, the district is in violation of 34 CFR Reg. 104.33.

The district has failed to provide parental notification of procedural safeguards concerning evaluation and placement, and has failed to secure parental involvement in individualized education programs, regarding placement, in violation of 34 CFR Reg. 104.36.

The district has identified the IEP as the only program used to meet the educational needs of its handicapped students; therefore, lack of complete implementation of the IEP constitutes noncompliance with Section 504, absent evidence of any other type of program being utilized by the district.

Summary of Findings and Required Actions

Of the six allegations indicated in this complaint, the Office for Civil Rights finds the district to be in compliance with respect to Allegations 3, 4 and 5, but finds the district to be in noncompliance concerning Allegations 1, 2 and 6. These findings and required corrective actions are summarized below.

Finding in No. 1 A–Suspension

The district has denied special education students an appropriate education in that it has treated their behavioral problems in the same manner that it treats the discipline problems of nonhandicapped students.

Specifically, the district made no provisions for determining whether the imposition of suspensions penalizes a student on the basis of the student's handicap. This violates 34 CFR Reg. 104.33(b) which requires that a program be designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met.

Corrective Action

School districts have the responsibility under Subpart D of this Department's Section 504 Regulation, to provide a free appropriate education regardless of the nature or severity of a student's handicap. A school district may not apply its usual suspension policies when the behavior for which suspension is being considered is an element of or related to a student's handicap or the result of an inappropriate placement. To do so would penalize the student on the basis of his or her handicap.

The district must include in its discipline procedures a process for determining whether a special education student's inappropriate or unacceptable behavior is part of that student's handicapping condition, prior to the imposition of disciplinary sanctions. Such a process must include consultation with special education personnel knowledgeable of the student's handicapping condition and accompanying behavioral symptoms, if any.

Finding 1 C–Corporal Punishment

By not considering handicapping conditions when administering corporal punishment, the district stands in violation of 34 CFR Regs. 104.33(a), (b)(1). It is our position that

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corporal punishment should not be included among disciplinary sanctions used with special education students. Traditionally, these forms of discipline have subjected handicapped children to the greatest abuse. Such forms of discipline should be used only upon prior agreement between parents and education professionals that such extreme measures are appropriate for special behavior problems.

Corrective Action

The district must establish and implement a standard policy regarding the corporal punishment of special education students, including prior agreement between parents and district that such punishment is to be administered, and for what specific misbehavior. Such actions must be documented and the records maintained for at least the 3-year monitoring period already agreed upon by the district and OCR.

Subpart G Reg. 104.61 of the Regulation implementing Section 504 of the Rehabilitation Act of 1973 states:

> "the procedural provisions applicable to Title IV of the Civil Rights Act of 1964 apply to this part."

Reg. 100.61(b) of the Regulation implementing Title IV of the Civil Rights Act of 1964 states that:

> "Each recipient shall keep such records and submit to the responsible Department official or his designee timely, complete and accurate reports at such times, and in such form and containing such information, as the responsible Department official or his designee may determine to be necessary to enable him to ascertain whether the recipient has complied or is complying with this part."

Relative to this same area of student discipline, the district retains no records of discipline administered to special education students subsequent to the end of each school year. Therefore, no data about the discipline with such students were available. In order to comply with the requirement to have available compliance reports, the school must retain complete and accurate records of all disciplinary actions imposed upon its special education students. These data must be retained throughout the 3-year period during which the district's compliance activities will be monitored by OCR; *i.e.*, from September 1980 through August, 1983. This monitoring period is a feature of the district's Compliance Plan submitted to OCR March 28, 1980, as the result of the investigations of Case Nos. 19791028 and 10791029. The data may be retired to an inactive file and maintained in confidentiality during this period, to accommodate the district's policy of providing a "fresh start" of its students each year.

Finding No. 2 A–Notice

The district is in violation of 34 CFR Reg. 104.32(b) regarding notice to handicapped persons and/or parents of its duty to provide education for qualified handicapped from within its jurisdiction.

Corrective Action

The district must develop and implement notice procedures for informing annually all qualified handicapped persons and/or their parents within its jurisdiction of its duties under Section 504.

Finding

Due Process Hearing

The district's failure to provide a prompt due process hearing upon request delayed the provision of an appropriate education to one of its students in violation of 34 CFR Reg. 104.33(b)(1) and Reg. 104.36 of the implementing Regulation.

Corrective Action

The district must establish and implement procedural safeguards to insure prompt resolution of complaints and appeals regarding the district's educational procedures.

Findings No. 6 A–Placement

The district has failed to provide an appropriate education for its special education students with respect to their individual education needs, in violation of 34 CFR Regs. 104.35(b)(1), (2).

Corrective Action

See No. 2 A.

Finding No. 6 B–Notice and Procedural Safeguards

The district has failed to provide parental notification of procedural safeguards regarding placement, and has failed to secure parental involvement regarding placement, in violation of 34 CFR 104.36.

Corrective Action

The district must establish and develop a set of procedural safeguards as required in 34 CFR Reg. 104.36 of the implementing Regulation of Section 504, including the establishment of prompt and equitable scheduling of due process hearings requested regarding the district's special education procedures.

Please provide this Office within thirty days of receipt of this letter with a plan that will bring the district into compliance with the Regulation and Section 504 of the Rehabilitation Act of 1973.

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Seattle (WA) School District No. 1
October 16, 1980

Complainant alleged that school district violated § 504 because of its suspension and expulsion procedures for handicapped students.

HELD, district violated § 504 by suspending/expelling 323 special education students during 1977-78 and 1978-79 school years for indefinite periods of time without first conducting a placement evaluation and preplacement conference or providing due process safeguards. Investigation indicated that district's policy called for pre-disciplinary conference to determine whether student's disruptive behavior was related to handicapping condition or result of inappropriate placement. However, procedure was insufficient to meet requirements of Reg. 104.35; 75 percent of students sampled were not provided appropriate evaluation conference while 25 percent were not provided any conference. Moreover, of 75 percent who did attend conference, in 40 percent of cases, no determination was made as to whether reason for expulsion was related to handicap and, in cases where it was determined that behavior was related to handicap, specific program changes recommended by conference participants were not implemented. On issue of due process safeguards, district failed to provide students and/or parents with advance notice that it was contemplating a placement change and, although all students or parents received written notice of district's intent to expel, none of notices indicated that student's removal from school constituted a placement change or that reevaluation and placement conferences had or had not taken place. District was advised to review its procedures: specifically, to respond to seriously disruptive behavior through use of emergency removals or short-term suspensions and to insure that student excluded for more than 10 days out of school year be reevaluated and placed as soon after removal as possible.

Dr. David Moberly
Superintendent
Seattle School District No. 1
815 Fourth Avenue North
Seattle, WA 98109

Re: Complaint No. 10780030

This will notify you that the Office for Civil Rights has completed its investigation of the above referenced discrimination complaint against the Seattle School District No. 1, Seattle, Washington. We appreciate the cooperation that your staff extended to our investigators during the on-site portions of our investigation and by submitting the data we requested. We have concluded that the district violates § 504 of the Rehabilitation Act of 1973 because of its suspension and expulsion procedures for handicapped children.

Our investigation concludes that the suspension and expulsion procedures utilized by the Seattle School District violate § 504 of the Rehabilitation Act of 1973. These procedures remove special education students from their school programs for indefinite or long periods of time without first conducting a placement evaluation and pre-placement conference in accordance with 34 CFR Reg. 104.35(a), (b) and (c) or providing procedural safeguards as required by 34 CFR Reg. 104.36. Thus, these procedures are defeating or substantially impairing accomplishment of the district's educational objectives with respect to handicapped persons.

The investigative findings which support this conclusion are listed below:

1. The Seattle School District No. 1 significantly changed the educational placement of 323 special education students, including those with behavioral problems, during the 1977-78 and 1978-79 school years through the imposition of long-term suspensions and expulsions. The use of these procedures has the effect of (i) removing students from their school programs for indefinite or long periods of time and thereby endangering the student's ability to meet the educational objectives of his/her individualized educational program, and (ii) changing a student's educational milieu by permanently removing him/her from one school and enrolling him/her in a new school where the previous IEP may not reflect the new school's ability to meet the student's needs.
2. The district has a procedure for providing a pre-disciplinary conference to determine whether the student's disruptive behavior is an element of or related to the student's handicapping condition or a result of an inappropriate placement. This procedure, however, was found insufficient to meet the requirements of 34 CFR Reg. 104.35(a), (b), and (c). The deficiencies identified in the district's procedures are:
    a. The provision of a pre-placement evaluation and placement conference prior to or within one day of the imposition of discipline was not uniformly available. Our investigation found that seventy-five (75) percent of our sample of the students expelled were not provided an appropriate evaluation conference.
        (i) In forty (40) percent of the conferences that were held, the district made no determination as to whether the students' disruptive behavior was an element of or related to his/her handicapping condition, or the result of an inappropriate placement. In sixty (60) percent of the conferences that were held, the district made a determination that the students' behavior was an element of or related to his/her handicapping condition or the result of an inappropriate placement. In the cases in which a determination was made, conference participants made recommendations regarding specific changes in the students' education program which were not implemented.

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(ii) In sixty-six (66) percent of the conferences conducted by the district, the placement decision was made without information from a variety of sources and did not include participation by persons knowledgeable about the child.

b. Our investigation found that twenty-five (25) percent of the students in our sample were not provided a pre-placement evaluation and placement conference at all, because the Special Education Department was not notified of the local school's decision to remove the students from his/her school program until several days after the action had been taken.

3. Section 504 requires that the school district afford handicapped students procedural safeguards in accordance with 34 CFR Reg. 104.36 when it considers significantly changing a student's placement. A disciplinary action in the form of a long term suspension or expulsion constitutes a significant change in placement. Therefore, a school district must provide procedural safeguards to handicapped students prior to the imposition of a long term suspension or expulsion. Our investigation found that:

a. None of the students and/or parents of students in our sample were provided advance notice that the district was contemplating a significant change in the student's educational placement.

b. All students and/or parents of students were provided written notice of the district's decision to expel the students, but none of these notices referenced the fact that: (i) the students' removal from school constitutes a significant change in placement, and (ii) a reevaluation and placement conference had/had not taken place.

In order to remedy the deficiencies discovered during our investigation, the Seattle School District No. 1 must modify its disciplinary policies to impose limitations on the use of suspensions and expulsions as a disciplinary measure for handicapped children as outlined below.

1. The district must not apply its long-term suspension and expulsion policies to handicapped students when the behavior for which suspension and expulsion is being considered is an element of or related to the student's handicap or the result of an inappropriate educational placement.
2. The district may respond to the seriously disruptive or dangerous behavior of handicapped students through the use of emergency removals or short-term suspensions. However, as a general rule the exclusion of a handicapped student from his/her education program for more than a total of 10 days during a school year constitutes a significant change in educational placement and shall be accompanied by an evaluation and new placement which must be completed as expeditiously as possible. During the evaluation and placement period, necessitated by a significant change in educational placement, the student shall continue to receive educational services.
3. If there are disagreements as to whether the disruptive or dangerous behavior is an element of or related to a student's handicap or the result of an inappropriate educational placement, the issue must be resolved in an impartial due process hearing prior to making any change in the student's educational placement.
4. The district shall develop and implement procedural safeguards to be used when handicapped students are subjected to disciplinary actions which will embody the remedial changes required. These procedures must be consistent with 34 CFR Reg. 104.36. One means of meeting this requirement would be the adoption of procedures consistent with the Education of the Handicapped Act.

Please contact this Office within 20 days of the receipt of this letter informing us of your intentions for correcting the violations. Failure to correct the violations may lead to administrative enforcement proceedings against the district and deferral of Federal funds for educational programs and activities. Further, the order of the U.S. District Court for the District of Columbia, in *Adams v. Hufstedler*, Civil Action No. 3095-70 (D DC, December 29, 1977), requires that enforcement proceedings be initiated within 90 days of the date of this letter if voluntary compliance is not achieved.

The Office for Civil Rights is always available to provide whatever assistance we can to help your district to develop an acceptable plan to remedy the situation. We believe it is in the best interest of all parties if this issue is settled without our having to resort to enforcement procedures.

Obligations of the Office for Civil Rights under the Freedom of Information Act require that we release this letter and other information about this case upon request by the public. In the event OCR receives such a request, we will make every effort to protect information contained herein that identifies individuals or that, if released, would constitute an unwarranted invasion of privacy.

If you have further questions, please call Mr. Felix E. Sandoval, Director, Elementary and Secondary Education Division or Ms. Patricia Yates, Branch Chief, at (206) 442-1930.

Gary D. Jackson
Acting Regional Director
Office for Civil Rights
Region X

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